No. 92-1450-CFX
Status: GRANTED

Title: Cynthia Waters, et al., Petitioners
v.
Cheryl R. Churchill, et al.

Docketed:
March 8, 1993

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Manson,Lawrence A.

Counsel for respondent: Bisbee,John H.

Entry	Date	Note	Proceedings and Orders
1	Mar 8 1993	G	Petition for writ of certiorari filed.
2	Apr 7 1993		DISTRIBUTED. April 23, 1993
3	Apr 19 1993	P	Response requested -- WHR. (Due May 19, 1993)
4	May 18 1993		Brief of respondents Cheryll R. Churchill, et al. in opposition filed.
5	May 26 1993		REDISTRIBUTED. June 11, 1993
6	May 27 1993	X	Reply brief of petitioners filed.
8	Jun 14 1993		REDISTRIBUTED. June 18, 1993
9	Jun 21 1993		Petition GRANTED.
			**********
11	Jun 29 1993		Order extending time to file brief of petitioner on the merits until August 19, 1993.
12	Aug 19 1993		Brief amici curiae of International City/County Management Association, et al. filed.
13	Aug 19 1993		Brief amicus curiae of United States filed.
14	Aug 19 1993		Joint appendix filed.
15	Aug 19 1993		Brief of petitioners Cynthia Waters, et al. filed.
18	Sep 3 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Sep 10 1993		Order extending time to file brief of respondent on the merits until October 13, 1993.
19	Oct 1 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Seventh Circuit.
20	Oct 12 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Oct 12 1993		Brief of respondents Cheryl R. Churchill, et al. filed.
24	Oct 12 1993		Record filed.
		*	Original proceedings United States District Court, Central District of Illinois (2 BOXES)
21	Oct 13 1993		Brief amici curiae of National Education Association, et al. filed.
26	Oct 13 1993	G	Motion of American Nurses Association for leave to file a brief as amicus curiae filed.
27	Oct 13 1993	X	Brief amicus curiae of National Employment Lawyers Association filed.
28	Oct 13 1993	X	Brief amici curiae of Southern States Police Benevolent Association, et al. filed.
23	Oct 14 1993		CIRCULATED.
25	Oct 14 1993		SET FOR ARGUMENT WEDNESDAY, DECEMBER 1, 1993.(1ST CASE).

Entry	Date	Note	Proceedings and Orders
29	Oct 18 1993		Letter from counsel for respondents received and distributed.
30	Nov 8 1993		Motion of American Nurses Association for leave to file a brief as amicus curiae GRANTED.
31	Nov 12 1993	X	Reply brief of petitioners filed.
32	Dec 1 1993		ARGUED.

92-1450

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,

Petitioners,

v.

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a public employer that terminates an employee based on credible, substantiated reports of unprotected, insubordinate speech may be held liable for retaliatory discharge under the First Amendment if it is later shown that the reports were inaccurate and that the employee actually spoke on protected matters of public concern, when the employer's ignorance of the protected speech is the result of an incomplete investigation.

2. Whether in January 1987, public officials were immune from liability for discharging an employee based on credible, substantiated reports of unprotected, insubordinate speech that were later shown to be inaccurate—because (a) it was clearly established that insubordinate speech was not protected by the First Amendment and (b) it was not clearly established that public officials had a duty to investigate beyond interviewing the reporter of the speech three times and the recipient of the speech once and allowing the discharged employee an opportunity to discuss the speech in question.[1]

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[1] Fairly comprised within these questions is the issue of whether the Seventh Circuit in part based its holding on assertions by plaintiff wholly unsupported by the record. Thus, if this case is accepted for review, Petitioners anticipate raising a third question, which may be stated as follows: "Whether, in opposing summary judgment, plaintiff Churchill presented sufficient evidence to sustain a jury verdict in her favor on her claims that she engaged in protected speech and that her protected speech was a motivating factor in defendants' decision to discharge her."

LIST OF PARTIES

The parties to the proceedings below were the petitioners Cynthia Waters, Kathleen Davis, Stephen Hopper and McDonough District Hospital and the respondents Cheryl R. Churchill and Thomas Koch, M.D.

RULE 29.1 STATEMENT

Defendant McDonough District Hospital is an Illinois municipal corporation. It has no parent or subsidiary corporations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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Petitioners,

v.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners Cynthia Waters, Kathleen Davis, Stephen Hopper and McDonough District Hospital respectfully request that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on October 15, 1992 and December 9, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 977 F.2d 1114 and is reprinted in the Appendix at App. 1. The order of the Court of Appeals for the Seventh Circuit denying defendants' peti-

tion for rehearing and suggestion for rehearing in banc is reprinted in the Appendix at App. 30.

The order of the United States District Court for the Central District of Illinois awarding defendants summary judgment as to plaintiff Cheryl Churchill's ("Churchill") First Amendment retaliatory discharge claim and dismissing both plaintiffs' freedom of expressive association claims under Rule 12(b)(6) has not been reported. It is reprinted in the Appendix at App. 31. The district court's earlier order granting defendants' motion for summary judgment as to Churchill's Fourteenth Amendment due process claims is reported at 731 F. Supp. 311 and is reprinted in the Appendix at App. 51.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 15, 1992. A timely petition for rehearing was denied on December 9, 1992.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 1. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. 14. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

> Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In this Section 1983 action, Churchill claims that defendants violated her First Amendment rights by firing her in retaliation for comments she allegedly made about the Hospital's policy of cross-training nurses in departments to which they were not regularly assigned. She also claimed that the individual defendants' conduct violated her Four-

teenth Amendment and contractual rights to due process.[2] The following facts are material to consideration of the questions presented by this petition:

On January 16, 1987, Mary Lou Ballew ("Ballew"), a registered nurse regularly assigned to the Hospital's Obstetrics ("OB") Department, where Churchill also worked, overheard comments made by Churchill to fellow nurse Melanie Perkins-Graham ("Graham"), a cross-trainee, during a conversation in the Department's kitchen area. (Supp. A. 53-55, 59-60).[3] Upset by what she heard, Ballew approached the OB Department's nursing supervisor, Defendant Cynthia Waters ("Waters"), and informed her that "Cheryl took Melanie the cross-trainee into the kitchen for a period of at least 20 minutes to talk about you [Waters] and how bad things are in OB in general." (Supp. A. 67-68, 213-16). Ballew construed those portions of the conversation she heard as "negative and intended to dampen the enthusiasm of" Graham, and she characterized the conversation this way when she reported it to Waters. (S.A. 31; Supp. A. 60-61).

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[2] By order dated February 16, 1990, the district court granted defendants' motion for summary judgment as to these claims, finding that Churchill had no contractual right to (and thus no property interest in) continued employment. App. 70, 73. By the time the district court disposed of this case, Dr. Thomas Koch ("Koch") had been added as a party-plaintiff who claimed that defendants retaliated against him for his opposition to the cross-training policy. Koch's claim was dismissed for failure to present a justiciable controversy. App. 39-41. In the Seventh Circuit, plaintiffs did not raise any issue as to dismissal of Koch's claim.

[3] Citations to the record below are designated as follows: References to the Short Appendix bound with Plaintiffs' Brief are designated "S.A." References to the Supplemental Appendix filed by Defendants are designated "Supp. A."

Waters communicated Ballew's report to the Hospital's Vice President of Nursing, Defendant Kathleen Davis ("Davis"), and they decided to meet with Graham to determine whether Ballew's report was accurate. (Supp. A. 220-22). On January 23, 1987, Waters and Davis met with Graham and her supervisor. (Supp. A. 223-27). At this meeting, Graham reported that Churchill (1) "said unkind and inappropriate negative things about Cindy Waters;" (2) "had discussed her evaluation quite a bit;" (3) "stated that Waters had wanted to wipe the slate clean and have things get better but this wasn't possible;" (4) "stated that just in general things were not good in OB and Hospital administration was responsible;" and (5) "stated that Kathy was ruining MDH [the Hospital]." (App. 6-7; Supp. A. 72-78, 93, 228-29).[4] Churchill has conceded that Waters and Davis *never* were informed that Churchill had discussed cross-training with Graham. App. 22 (noting that *Churchill "alleges* . . . they were unaware of the actual content of her January 16, 1987 conversation") (emphasis added).

On January 26, 1987, Waters again spoke with Ballew, who said that in the conversation with Graham, Churchill (1) "was knocking the department;" (2) had stated that

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[4] At her deposition, Graham confirmed the accuracy of Waters's and Davis's accounts of their interview with Graham. She also described Churchill's comments as follows: (1) "the overall message was not a positive one as far as her relationship with Cindy;" (2) [Churchill] "shar[ed] with me about her evaluations with Cindy;" (3) "she told me that she and Cindy didn't get along;" (4) "Cheryl was telling me that Cindy had said that she thought they should wipe the slate clean and try to start anew and so forth and Cheryl said that she told her [Waters] that wasn't possible;" (5) "[Waters] didn't do much;" (6) "the general gist . . . was negative feelings between Cheryl and [Waters];" and (7) "[Davis] was going to ruin the hospital." (Supp. A. 84-85, 87-92).

Waters "was trying to find reasons to fire her" and had continued to blame Churchill for a patient complaint that was not Churchill's fault; and (3) "was saying what a bad place OB is to work." Ballew assured Waters "she would be willing to swear this was all true." (Supp. A. 53-54, 56-68).

Based on the reports they received from Ballew and Graham, Waters and Davis believed that Churchill was continuing her insubordinate and negative behavior—about which she had received written counseling only two weeks before. (Supp. A. 70-71, 218-19).[5] In Davis's view, the comments Churchill was accused of making were "against everything we were striving for to make it an attractive place to work, getting people to want to work down there, so this was a very negative thing to happen at that particular time." (Supp. A. 79). Waters saw the comments as yet another manifestation of Churchill's negative attitude and insubordinate behavior—"the straw that broke the camel's back." (Supp. A. 217-19). Davis and Waters decided that comments such as those Churchill was accused of making constituted an additional blatant act of insubordination and thus merited termination. (Supp. A. 70-71, 80-81).

Waters and Davis met with Churchill on January 27, 1987. According to Churchill, Waters and Davis informed her that they had decided to terminate her because of (1) her refusal to change her negative behavior despite

[5] During the final year of her employment, Churchill had repeatedly engaged in rude, insubordinate behavior toward Waters, her immediate supervisor. This behavior was observed not only by Waters, but also by other nurses in the OB Department. (Supp. A. 50-53, 95-98, 152-61). Churchill had been counseled on several occasions regarding her negative attitude toward the Hospital administration and Waters. (Supp. A. 174-85, 187-212).

being told several times that she must do so; and (2) "a conversation lasting 15-20 minutes with a cross-trainee who had been assigned to OB for a particular evening shift, [which] was reported as being non-supportive of the department and of its administrative leadership." (Supp. A. 37-39, 41-43).

Churchill filed a grievance with Defendant Stephen Hopper ("Hopper"), the Hospital's president, regarding her complaint that she had been "unjustifiably discharged" and "terminated . . . based on rumors and gossip." (Supp. A. 44). On February 6, 1987, Churchill met with Hopper and Bernice Magin ("Magin"), the Hospital's vice president of human resources, to discuss her grievance. According to Churchill, Hopper asked her to discuss (1) an earlier "first warning" regarding Churchill's insubordinate comments to Waters during a cesarean section; (2) "the comments [regarding insubordination] Cindy had written on my last evaluation;" and (3) "the incident regarding my talking about Cindy and Mrs. Davis, with negative overtones, one evening while working in OB with a cross-trainee working the same shift with me." (Supp. A. 40, 45-47). Instead of responding to Hopper's request that she discuss these topics, Churchill chose to voice her complaints about Hospital administration. She never indicated that these complaints also were the subject of the conversation with Graham.[6]

[6] The Seventh Circuit's conclusion that Hopper cut Churchill off when she attempted to describe her conversation with Graham is based on Churchill's repeated mischaracterization of the conversation in her briefs. For the reasons discussed below, what actually happened during the grievance meeting is irrelevant to the questions presented. However, because the Seventh Circuit's description of the investigation conducted here appears to have been so heavily influenced by its view of this meeting, defendants have included *Churchill's* account of the meeting in the Appendix. App. 75.

As part of his investigation of Churchill's grievance, Hopper reviewed Waters's and Davis's written reports of their conversations with Ballew and Graham. (Supp. A. 108). Hopper also had Magin interview Ballew one more time *after* the grievance meeting with Churchill. (Supp. A. 139-43, 147). Ballew once again confirmed the substance of her report to Waters regarding Churchill's negative comments about Waters and Davis. (*Id.*). After reviewing the information available to him,[7] Hopper decided not to overrule Davis's and Waters's decision to terminate Churchill's employment. His decision was based not only on Churchill's comments to Graham but also on her prior record of negative, insubordinate behavior. (Supp. A. 48, 100-07, 115-37, 144-46).

It is undisputed that Ballew's and Graham's reports were the precipitating factor in the decision by Waters and Davis to terminate Churchill, and in the decision of Hopper to approve the termination.

Based on these facts, defendants moved for summary judgment on the following grounds: (1) Churchill's statements to Graham (regardless of the version) did not constitute protected speech because Churchill was not raising issues of public concern because they were of public concern; (2) the Hospital's legitimate need to maintain discipline and harmony among co-workers outweighed Churchill's interest in making the comments she made to Graham; (3) the speech reported to defendants was unprotected as

[7] The Seventh Circuit suggested that defendants should have interviewed Jean Welty and Koch, both of whom allegedly witnessed part of the conversation between Churchill and Graham. There is no evidence that defendants ever were aware that either Welty or Koch was present during the conversation. This explains why they were not questioned.

a matter of law, and defendants were unaware of any protected speech at the time they made the decision to terminate Churchill; (4) the individual defendants were immune from liability because their actions were not clearly proscribed by the law in effect at the time of Churchill's termination, in light of the specific facts confronting them when they acted; and (5) the Hospital could not be held liable for any alleged constitutional violation because the individual defendants were not acting pursuant to any unconstitutional policy or custom of the Hospital.[8] The district court granted summary judgment on the first two grounds and did not reach the last three.[9]

The Seventh Circuit reversed, holding that "the district court inappropriately resolved material issues of fact against Churchill in holding that her speech was not a matter of public concern" and "was critical and disruptive of the hospital's interests." App. 9, 15-19. The court also went on to reach the issues not addressed by the district court. It held that defendants, including the individual defendants, could be held liable despite their lack of knowledge of Churchill's protected speech. The court stated:

> We hold that when a public employer fires an employee for engaging in speech, and that speech is *later* found to be protected under the First Amend-

[8] Churchill filed a cross-motion for summary judgment, contending that defendants' alleged failure to properly investigate the actual content of her speech violated her right to due process under the First Amendment. The district court denied this motion, a decision affirmed by the Seventh Circuit. App. 23 31.

[9] The district court also dismissed (pursuant to Rule 12(b)(6)) Churchill's claim that her termination violated her right of expressive association with Dr. Koch. App. 41-43. The Seventh Circuit affirmed this dismissal. App. 10 n.6.

> ment, the employer is liable for violating the employee's free-speech rights regardless of what the employer *knew* [emphasis in original] at the time of termination. If the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct, the employer runs the risk of eventually being required to remedy any wrongdoing *whether it was deliberate or accidental.*

App. 25 (emphasis added unless otherwise noted).

The Seventh Circuit also rejected the individual defendants' claim of qualified immunity. The court held that "in 1987 the law was clear that the speech of public employees while at work was protected under the First Amendment if it was about matters of public concern" and that "it is immaterial that the defendants were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern." App. 27. It is not clear whether the Seventh Circuit actually reached the issue of the Hospital's liability.[10]

[10] The court expressed "serious reservations about whether the defendants can prevail on this defense," but did not specifically rule. App. 27-28 n.11. If this Court grants review and reverses the Seventh Circuit on the qualified immunity issue, this Court may reach the question of the Hospital's liability. Thus, if the Court grants review, defendants will address this issue.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit's Holding That Public Officials May Be Held Liable for Mistakenly Believing Reports of Insubordinate Speech Raises Important and Unresolved Questions for All Public Employers.

Public workplaces are no less susceptible to the disharmony caused by insubordination than are their private counterparts. In *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court recognized the necessity of allowing public employers to eliminate such disharmony by punishing employees guilty of insubordinate speech. Indeed, even when an employee's speech arguably includes matters of public concern, a public employer is privileged to balance the employee's First Amendment rights against "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. A public employer need not "tolerate action which he *reasonably believe[s]* would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154 (emphasis added).

While acknowledging these basic constitutional principles, the Seventh Circuit nevertheless held that a public employer who terminates an employee based on reports of unprotected, insubordinate speech may be held liable for retaliatory discharge under the First Amendment if it is *later* shown that the reports were inaccurate and that the employee actually spoke on matters of public concern.[11] Although it expressly rejected Churchill's claim

[11] A substantial portion of the opinion below is devoted to the proposition that cross-training is an issue of public concern. Defen-

(Footnote continued on following page)

of a right to due process under the First Amendment (App. 23, 24 n.9),[12] the court below nevertheless held that an employer unaware of protected speech because of "an inadequate investigation"[13] may be held liable for retaliatory discharge "regardless of what the employer *knew* at the time of termination" and even if its lack of knowledge was "accidental." App. 25, 29.

In the Seventh Circuit's view, a public official risks substantial individual liability if he or she terminates an employee based on credible reports of insubordinate remarks, substantiated by two witnesses to the conversation in question, if other witnesses later come forward and convince a jury that the employer was misled at the time of termination. This extraordinary holding, which creates a standardless "duty to investigate" coupled with a negligence standard for liability, merits review by this Court.

[11] *continued*
dants never have contended otherwise. Once the Seventh Circuit made this point, it failed to discuss the equally well-settled proposition that comments such as those reported by Ballew and Graham do *not* address matters of public concern and are not protected by the First Amendment.

[12] In so doing, the court noted that in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court "did not establish any type of procedural protections and thus did not create a First Amendment due-process right." App. 24 n.9.

[13] The court did not discuss how much investigation an employer need do to meet this requirement, and it did not identify the constitutional source of this requirement.

II.

The Seventh Circuit's New Standard for First Amendment Retaliatory Discharge Actions (a) Conflicts Directly with This Court's Holding in *Mt. Healthy* and (b) Conflicts in Principle with Decisions of the Fourth, Fifth, Eighth, Tenth and Eleventh Circuits as to the State of Mind Required in First Amendment Retaliation Cases.

It is undisputed that defendants *never* were informed that Churchill had discussed cross-training with Graham. Thus, defendants could not have been motivated by Churchill's allegedly protected speech when they made the decision to terminate her. In the Seventh Circuit's view, this undisputed fact is "immaterial" and defendants may be held liable if Churchill's speech is eventually found to have been protected "regardless of what [they] knew at the time of termination" and even if their alleged violation of Churchill's rights was "accidental." App. 25, 29. This holding conflicts with *Mt. Healthy*'s requirement that protected speech be a substantial motivating factor in the termination decision.

In *Mt. Healthy*, this Court "formulate[d] a test of causation" applicable to First Amendment retaliatory discharge cases. 429 U.S. at 283-87. In such cases, the plaintiff must "show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor' in the [employer's] decision" to terminate her. 429 U.S. at 287. The Court relied on earlier decisions requiring proof of "discriminatory intent" in cases of unconstitutional discrimination based on race. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977) (citing *Washington v. Davis*, 426 U.S. 229 (1976)). Thus, the constitutional tort recognized in *Mt. Healthy* is an intentional one—the plaintiff must prove

"that the defendant's *intent* . . . to violate the plaintiffs' constitutional rights was a substantial motivating factor in the employment decision." *Tanner v. McCall*, 625 F.2d 1183, 1192 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981) (citing *Mt. Healthy*, 429 U.S. at 287; *Washington*, 426 U.S. 229) (emphasis added).

Churchill did not even attempt to convince the courts below that defendants actually knew about her allegedly protected speech. Nor did she contest the content of Ballew's reports to defendants, which disclosed only unprotected, insubordinate speech.[14] She claimed only that defendants had failed to conduct an adequate investigation. But defendants had several conversations with Ballew and Graham to confirm what Churchill said. Hopper also invited Churchill to give her side of the conversation. Even if, as the Seventh Circuit found, this investigation was somehow deficient, defendants' alleged negligence during the investigation is not a cognizable claim under *Mt. Healthy*. *See Daniels v. Williams*, 474 U.S. 327, 330 (1986). *Mt. Healthy* requires that protected speech be a "motivating factor" in the discharge decision. Defendants could not be held liable merely for an "inadequate investigation."

The Seventh Circuit's analysis also conflicts with the second stage of *Mt. Healthy*'s causation analysis. Even

[14] This is not a case in which defendants had no basis for believing that Churchill engaged in insubordinate conduct. Viewed in the light most favorable to Churchill, the record merely showed that Churchill might *also* have addressed an issue of public concern in a portion of her conversation of which defendants never were aware. It is entirely speculative to assume, as the Seventh Circuit apparently did, that a more "thorough" investigation would have caused defendants to disbelieve Ballew and Graham.

when protected speech *is* a substantial motivating factor in a termination (a fact not present here), a public employer may still prevail if it shows "that it would have reached the same decision as to [the employee's termination] even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287. In the district court, Churchill conceded that "speech on matters of purely personal interests or for the purpose of advancing personal grievances and the like is not protected. Furthermore, Plaintiff has no doubt that the reports submitted by Ballew and Graham to Waters and Davis could be construed in such a fashion." (Supp. A. 6). The uncontroverted record in this case established that defendants *did* construe the reports in such a fashion. By holding that defendants nevertheless can be held liable if their conclusions were wrong, the decision below conflicts with *Mt. Healthy* by imposing liability even when the employer has shown that it would have reached the same termination decision in the absence of protected conduct.

Although no circuit court of appeals has addressed the precise situation presented here, two circuits have refused to find a duty to investigate under the First Amendment, and three others have required proof of retaliatory intent.

In *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), the plaintiff (like Churchill) contended that the defendant decisionmaker relied too heavily on reports of insubordinate speech by a biased subordinate and failed to conduct an independent investigation before terminating the plaintiff based on those reports. *Id.* at 863. While noting that the defendant's "investigation into the circumstances surrounding [the plaintiff's] termination was not a model of thoroughness," the Tenth Circuit held that "these omissions and oversights amount[ed] at most to simple negligence, which cannot form the basis for a First

Amendment claim." *Id.* Even if, as alleged, the defendant was unaware of the plaintiff's protected speech as a result of the inadequate investigation, the "protected speech was not a substantial or motivating factor in [the defendant's] decision and . . . [the plaintiff] therefore failed to establish a First Amendment claim." *Id.* (relying on *Mt. Healthy*).

Similarly, in *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979), the plaintiff claimed that the defendant placed undue reliance on the representations of the plaintiff's supervisor when the defendant decided to terminate the plaintiff based on statements critical of her fellow employees. *Id.* at 1064. The plaintiff (like Churchill) contended that the defendant would have come to a different conclusion had he "taken it upon himself to make an independent investigation." *Id.* The Eighth Circuit refused to find any such duty of independent investigation. *Id.*[15]

In *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir. 1992), the plaintiff was disciplined for unprotected remarks which were reported in the local media. The plaintiff took the defendants to task for accepting a newspaper account of what he said and rejecting his version of the remarks. *Id.* at 1234. Since it was undisputed that the defendants believed the newspaper accounts, the Eleventh Circuit found irrelevant "what [the plaintiff] says he said [and] what he in fact said." *Id.*

In *Sims*, the court noted that the plaintiff did "not contend that the Defendants deprived him of procedural due process during their investigation of his conduct." *Id.* Here, Churchill did make such a claim. However, the district court found that Churchill had no Fourteenth Amend-

[15] In coming to its conclusion, the court was addressing the defendant's qualified immunity defense, a context discussed *infra*.

ment right to due process (a decision not appealed) and the Seventh Circuit refused to create a right to due process under the First Amendment. Thus, it is not entirely clear how the Seventh Circuit came to its conclusion that defendants could be held liable for an "inadequate investigation." App. 25.

The *Sims* court did address the standard for finding an investigation sufficient to establish a qualified immunity defense:

> The law does not require omniscience of the Defendants in their investigation of employee conduct; it requires only that their investigation be thorough enough to support a reasonable person's conclusion that action based thereon would not violate clearly established law.

Sims, 972 F.2d at 1234. Here, defendants' three interviews of Ballew, interview of Graham, and grievance meeting with Churchill supported a reasonable conclusion that Churchill engaged in unprotected, insubordinate speech sufficient to warrant her discharge.

The decision below that defendants could be held liable for "accidental" First Amendment violations also conflicts in principle with the holding in *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981). In *Tanner*, a political firing case, the Fifth Circuit held that "[p]rima facie proof of a constitutional violation must include evidence of impermissible motive. Although *Arlington Heights* and *Davis* were equal protection cases, the same burden of proof has been imposed in first amendment cases arising under the due process clause of the fourteenth amendment." *Id.* at 1193 (citations omitted). Similarly, in *Bell v. School Board of City of Norfolk*, 734 F.2d 155 (4th Cir. 1984), another action alleging retaliation for First Amendment protected conduct, the Fourth

Circuit held that a plaintiff must prove "evil motive" to prevail. *Id.* at 157.[16]

Without citation to any authority other than *Mt. Healthy*, the Seventh Circuit has established a standardless duty to investigate before a public employer may terminate an employee for insubordinate speech and has extended liability to accidental failures to fulfill this newly created duty. Given the apparent conflict between this holding and *Mt. Healthy*'s causation requirement, and the confusion this decision is likely to create when compared to decisions in other circuits, this case merits review by this Court.

III.

The Seventh Circuit's Qualified Immunity Standard Appears to Conflict with the Holding of This Court in *Anderson* (and of All Circuits to Address the Issue) That Public Officials Can Be Held Liable Only for Violations of Constitutional Principles That Are (a) Clearly Established (b) in Light of the Information Possessed by the Officials When They Act.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court held that the immunity of public officials from individual liability for alleged constitutional violations must be determined based on the "objective legal reasonableness" of their actions, "assessed in light of the legal rules that were 'clearly established' at the time [those actions

[16] Before this case, the Seventh Circuit also required plaintiffs in First Amendment retaliatory discharge cases to prove that "the substantial or motivating factor was retaliation" and that the "exercise of first amendment rights [was] the 'cause' of the [adverse action suffered by the plaintiff]." *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968 (1988).

were] taken." *Id.* at 639 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). Needless to say, the holding here, which appears to run contrary to *Mt. Healthy* and every case on point, cannot be said to state law that was "clearly established" six years earlier when defendants acted. To be sure, as the Seventh Circuit held, "the right . . . to speak out on matters of public concern was established long before 1987." App. 29. But in framing the issue as broadly as it did, the court below ignored this Court's instruction that the right to be protected cannot be identified at a "level of generality" which "bear[s] no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson*, 483 U.S. at 639.

Here, the issue properly framed was whether it was "clearly established" under *Mt. Healthy* that defendants could not act based on Ballew's and Graham's reports, which stood uncontradicted by Churchill despite Hopper's request that she discuss (in Churchill's words) "the incident regarding [Churchill] talking about [Waters] and Mrs. Davis, with negative overtones, one evening while working in OB with a cross-trainee working the same shift with me." App. 75. In holding that defendants did not do enough to find out what Churchill said, the court below cited no precedent other than *Mt. Healthy*, which the Seventh Circuit acknowledged *does not address any duty to investigate*. As this Court has held, the lack of any relevant precedent alone undercuts any assertion that the duty described by the Seventh Circuit was "clearly established." *Procunier v. Navarette*, 434 U.S. 555, 563-64 (1978). Here, defendants "could not reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Id.* at 565. The Seventh Circuit's holding is particularly troublesome in light of this Court's holding in *Connick v. Myers*, 461 U.S. 138 (1983), that

public employees *could* be discharged for insubordinate speech of the type reported to defendants.

The holding below also appears to conflict with the well-settled principle that a public official's actions must be evaluated based on the information possessed by the public official at the time he or she acted. *Anderson*, 483 U.S. at 641. Circuit courts following *Anderson* consistently have held that "even where the officials clearly should have been aware of the governing legal principles, they are nevertheless entitled to immunity if based on the information available to them they could have believed their conduct would be consistent with those principles." *Good v. Dauphin County Social Services for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989).[17] At the time of Churchill's discharge, there was nothing to put defendants on notice that Ballew's and Graham's reports might be inaccurate or that Churchill's speech might have focused on matters of public concern because they were of public concern. If, based on the information in the reports, a reasonable public official "*could have believed*" that Churchill's speech was unprotected under *Connick*, or that the hospital's interest in maintaining harmony among its employees outweighed any First Amendment right of Churchill

[17] *See also Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 667 (8th Cir. 1992); *Kreines v. United States*, 959 F.2d 834, 839 (9th Cir. 1992); *Hardin v. Hayes*, 957 F.2d 845, 848-49 (11th Cir. 1992); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1064 (11th Cir. 1992); *McBride v. Taylor*, 924 F.2d 386, 389 (1st Cir. 1991); *Creighton v. Anderson*, 922 F.2d 443, 447 (8th Cir. 1990). When, as in certain Fourth Amendment and due process cases, there is a duty to investigate, an official also may be charged with knowledge of information "reasonably discoverable" by the official. *Sevigny v. Dicksey*, 846 F.2d 953, 957 n.5 (4th Cir. 1988). As noted above, no court ever has established such a duty in a First Amendment retaliatory discharge case.

under *Pickering*, then the individual defendants were entitled to immunity even if they were "mistaken." *Anderson*, 483 U.S. at 641.

The Seventh Circuit's holding that defendants can be held liable "regardless of what [they] *knew*" [emphasis in original] and even if their lack of knowledge was "accidental" runs contrary to the basic premise of this Court's qualified immunity holdings:

> Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Scheuer v. Rhodes, 416 U.S. 232, 242 (1974). The court below, by focusing on what Churchill might have said, rather than on what defendants reasonably believed she did say, also ignored Justice Holmes's instruction that "the matter is to be judged on the facts as they appeared then, and not merely in the light of the event." *Moyer v. Peabody*, 212 U.S. 78, 85 (1909).[18]

[18] The Seventh Circuit even ignored its own holding in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992). In *Elliott*, the plaintiff was transferred after her employer received reports that her inability to get along with her supervisor undermined productivity in her department. 937 F.2d at 341, 343. The plaintiff claimed that the true motive for her transfer was her protected speech concerning a conflict of interest by the supervisor, but (like Churchill) she did not deny that the defendants had received reports of dissension in her department. *Id.* at 343. The Seventh Circuit held that the defendants were entitled to summary judgment on qualified immunity grounds because they acted on the basis of the reports. The court stated:

> [T]he question is not what the conditions in the [department] *were*; it is what the administrators reasonably believed them

(Footnote continued on following page)

The Seventh Circuit held defendants to a standardless duty to investigate never discussed, let alone clearly established, prior to this case. Then it concluded that the individual defendants "will be liable for damages for retaliatory discharge" if the jury believes Churchill, regardless of what defendants believed at the time of their decision. App. 29. This unprecedented, narrow view of qualified immunity will subject public officials to individual liability despite the "objective legal reasonableness" of their actions. It also will allow many more cases to proceed beyond the summary judgment stage and needlessly increase the litigation costs to be borne by public officials. This is the very result this Court's qualified immunity doctrine has sought to avoid. *See Anderson*, 483 U.S. at 640 n.2, 646 n.6. Accordingly, the Seventh Circuit's qualified immunity holding merits review by this Court.

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[18] *continued*

to have been. [Citations omitted]. *Objectively reasonable but mistaken conclusions do not violate the Constitution. If we assume that the staffers [who made the reports] were lying, this does not establish that the administrators' actions were unreasonable, given the information in their possession.* Conditions in the [department] are not relevant; *the inquiry must focus on what the defendants knew*, and whether reasonable persons in their position would have believed their actions proper given the state of the law in 1987.

Id. at 343-44 (emphasis added).

CONCLUSION

For these various reasons, petitioners respectfully request that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-2288

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

Plaintiffs-Appellants,

v.

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and MCDONOUGH DISTRICT HOSPITAL, an Illinois municipal corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 87 C 1117—**Michael M. Mihm,** *Chief Judge.*

ARGUED FEBRUARY 14, 1992—DECIDED OCTOBER 15, 1992

Before CUDAHY, COFFEY, and MANION, *Circuit Judges.*

COFFEY, *Circuit Judge.* Cheryl R. Churchill appeals the district court's entry of summary judgment against her claim that the defendants fired her because she spoke out on a matter of public concern, namely the reduced quality of nursing care in the hospital's obstetrics department as a result of a recently instituted cross-training program. Because we hold that Churchill's speech is a matter of public concern when viewed in the light most favorable to the plaintiff Churchill (as we review the entry of summary judgment), we reverse.

I. FACTS

McDonough District Hospital in Macomb, Illinois hired Cheryl Churchill as a part-time nurse in the obstetrics department on October 25, 1982. Churchill began working full time on September 16, 1985 and continued on full time status until her discharge on January 27, 1987. Churchill's performance evaluations received every six months during her employment demonstrated steady improvement through the December 1985 evaluation, and at this time the ratings improved to above standard performance or standard in every category. Churchill's June 1986 performance evaluation took a nose dive when Cynthia Waters, Churchill's supervisor, rated her performance as below standard in three of some fifty rating categories. But on the next six month's performance review in December 1986, Churchill once again received ratings of above standard or standard performance in every area.

Churchill's comments about her view of her job in the space provided on the evaluation forms for employee comments reflect her to be a cheerful employee who was enjoying her work through the December 1985 evaluation. Indeed, in the additional evaluator's comments on the December 1985 evaluation, Waters stated that "Cheryl has a very bubbly contagious sense of humor most times." But in spite of rating Churchill's performance as above standard or standard in every category on the December 1986 evaluation, Waters noted that Churchill "exhibits negative behavior towards me and my leadership through her actions and body language . . . ." Waters discharged Churchill less than two months after making these critical comments on an otherwise positive evaluation. Churchill alleges that the breakdown in relations between herself and Waters was the result of Waters' displeasure with her opposition to the hospital's improper implementation of a nurse cross-training program, which Churchill was convinced was detrimental to the welfare of patients in the obstetrical ward, as well as Waters' hostility toward her concerning her association with Dr. Koch, who like

Churchill had been subjected to Waters' animosity. In this review of a summary judgment against Churchill, we accept her version of events as true to the extent supported by the record or reasonable inferences therefrom.

In April of 1986 defendant Kathy Davis was hired as the hospital's vice president for nursing. Davis initiated a nurse staffing policy called "cross training," which involved transferring nurses to work in departments other than those in which they were trained and to which they were ordinarily assigned. Churchill objected to the cross-training program not as a matter of policy but on the ground that the cross-training was being implemented improperly, for rather than being assigned to a department for an organized training program on a regular schedule, nurses were assigned to other departments (e.g. nurse from orthopedics transferred to obstetrics) for "cross training" only when their respective departments were over staffed vis-à-vis the nurse-patient ratio in the particular discipline. Churchill felt that this cross-training procedure as implemented created a serious problem, for nurses would be inadequately trained and ill prepared to perform in the areas where they were only sporadically assigned. Furthermore, sending uneducated and untrained nurses into an unfamiliar discipline often distracted the regular nurses from their appointed tasks, thereby interfering with proper patient care and thus endangering patients. Churchill allegedly incurred the wrath of Waters and Davis through her vocal criticism of the type of cross-training program utilized.

Churchill asserts that she inadvertently aroused additional antagonism from the hospital administration through her association with Dr. Thomas Koch, the clinical head of the obstetrics ward, who was likewise outspoken in his opposition to the hospital's implementation of the cross-training program. According to Churchill, Dr. Koch initially incited the hospital administration's animosity in 1982 when he blamed inadequate nurse staffing in the

obstetrics department for the birth of a stillborn baby.[1] Prior to the incident of the stillborn baby, Koch had notified Waters that he believed the obstetric ward was understaffed, but it was not until after the near-fatal birth (resulting in brain damage to the infant) that the hospital agreed to provide additional staffing. Dr. Koch's battle with the hospital administration over nurse staffing policy continued through his opposition in 1986 to the cross-training program. By the summer of 1986, Churchill and Koch had become social friends (subsequently married in 1991), and the hospital administration perceived them as professional allies. Churchill's association with Koch allegedly offended the hospital administration, for she was able to provide him with information that he would otherwise not have had concerning the assignment of inexperienced nursing personnel to the staff in the obstetrics area. This in turn supplied him with ammunition for his campaign for improved and acceptable nursing care. By August of 1986, it became apparent that the hospital administrators were keeping files of criticisms rendered by Waters and Davis about Koch.

On August 21, 1986, a "code pink"[2] medical emergency occurred during a cesarean section procedure. When Churchill responded to the code pink, Dr. Koch instructed her to assist him with the emergency C-section.[3] Churchill

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[1] Although Dr. Koch was able to revive the baby, it still suffered mild mental retardation. The baby's parents brought suit against the hospital and Dr. Koch for the injury in an Illinois state court in 1984. The hospital settled out of court, and a jury acquitted Dr. Koch of any malpractice or other wrongdoing in the occurrence.

[2] A "code pink" in McDonough District Hospital means that the life of a baby or its mother (or both) is in immediate danger. When a code pink is called, all available doctors and nurses are required to report to the room where the emergency is occurring to render assistance.

[3] According to Dr. Koch's deposition, Churchill was the only nurse in the delivery room providing useful aid at the time.

assisted Dr. Koch until the C-section was completed and the baby was successfully delivered, at which time she excused herself in order that she might check on another patient who was in the early stages of labor. Upon determining that her other patient was not in need of immediate attention, Churchill returned to the delivery room and began documenting in the patient's record the various medical and surgical procedures used during the delivery. Shortly thereafter Waters, who entered the delivery room while Churchill was checking on her other patient, called Churchill from across the room and ordered her to check on her patient. Churchill in responding stated that she had just checked the patient and said: "you don't need to tell me what to do." Churchill thereupon returned to her patient as instructed even though she had not completed her patient record entries. Dr. Koch was furious with Waters for interfering with his operation and attempted to talk with her after completing the surgery, but she refused to discuss the matter with him alone. Waters called Stephen Hopper, the hospital's chief executive officer, and thereafter Waters, Koch and Hopper met to discuss the incident. The following day Hopper and Waters met with Davis and the administrative head of obstetrics to discuss Dr. Koch's complaints[4] and to decide how to deal with Churchill's response to Waters in the delivery room during the code pink procedure. They decided to issue Churchill a "written warning"[5] for insubordination because of her comment "[y]ou don't have to tell me how to do my job."

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[4] Hopper and Waters unsuccessfully attempted to block Dr. Koch's reappointment to staff privileges at the hospital for 1987.

[5] The hospital's Employee Handbook stated under "DISCIPLINE-GENERAL GUIDELINES" that "[t]he normal progressive discipline procedure consists of: 1. Verbal counseling[;] 2. First written warning[;] 3. Final written warning, which may include suspension[;] and 4. Discharge . . . exceptions or deviations from the normal procedure may occur whenever Administration deems appropriate."

The relationship between Churchill and Waters apparently continued to deteriorate throughout the fall of 1986, as Churchill's December 1986 evaluation included critical comments for the first time. In the evaluation Waters commented that Churchill's attitude toward her "promotes an unpleasant atmosphere and hinders constructive communication and cooperation." At the time of Churchill's discharge, the hospital administration decided to regard Waters' critical comments as a second "written warning."

The incident that directly led to Churchill's dismissal was her January 16, 1987 break-room conversation with a cross-trainee, Melanie Perkins-Graham, and Dr. Koch. According to Churchill's version of the occurrence, "practically the entire conversation related to cross-training and inadequate staffing, pulling of staff. The entire conversation almost, the majority of it consisted of speaking into [sic] terms of patient care and our concerns regarding that." In her deposition Churchill admitted that she said that if Davis' staffing policies were unchanged, Davis would ruin the hospital because "her administrative decisions seemed to be impeding nursing care." But she stated that when Perkins-Graham expressed reservations about transferring to obstetrics because of Waters' reputation throughout the hospital of being difficult to work with, she (Churchill) said that should not affect Perkins-Graham's decision because Waters was just doing her job. Churchill asserts that she encouraged Perkins-Graham to consider transferring to obstetrics full time and denied having engaged in personal criticism of Davis or Waters during that conversation. Mary Lou Ballew, another nurse who allegedly overheard only portions of the conversation, reported to Waters that Churchill took "the cross trainee into the kitchen for a period of at least 20 minutes to talk about you and how bad things are in OB in general." As a result of Ballew's report, Waters and Davis met with Perkins-Graham to discuss the conversation she had with Churchill. According to Davis' notes of the meeting, Perkins-Graham

> "stated that Cheryl had indeed said unkind and inappropriate negative things about Cindy Waters. She went on to say that Cheryl was not quiet about it and had assured her that I [Davis] had complete knowledge of everything she was saying because had said it to my face. She explained that Cheryl had discussed her evaluation quite a bit. She stated that C. Waters had wanted to wipe the slate clean and have things get better but this wasn't possible. She also stated that just in general things were not good in OB and hospital administration was responsible. Kathy Davis' name had also come up in the conversation and Cheryl had stated that Kathy was ruining [the hospital]. . . . By the end of the conversation [Perkins-Graham] was stating that she knew we could not tolerate that kind of negativism."

Waters and Davis did not question Churchill about the conversation, nor did they question Dr. Koch or another nurse who overheard the conversation, Jean Welty, both of whom have made it clear that they would have supported Churchill's version of the incident.

As soon as Davis heard about Churchill's conversation with Perkins-Graham, she decided to fire Churchill. But since she did not feel that she had the authority to terminate Churchill on her own, she bucked the decision up to Hopper. At a meeting on January 26, 1987, Waters, Davis, Hopper and the personnel director of the hospital, Bernice Magin, agreed to terminate Churchill's services. When Churchill arrived for work on January 27, 1987, Waters met her at the door of the obstetrics department and requested that Churchill accompany her to Davis' office. According to Churchill's notes from the meeting, Davis informed her in the presence of Waters that

> "it had recently been brought to her attention that I was continuing to exhibit negative behavior in the department, and that I had been reported by someone to have had a conversation lasting fifteen to twenty minutes with a cross trainee who had been assigned to OB for a particular evening shift. [Kathy Davis] declined to identify the date of the incident, or the

> name of the person with whom I was supposed to have talked even though I asked her. She replied by telling me that my conversation was reported as being non-supportive of the department and of its administrative leadership. Because of that, she said, 'We are going to have to terminate you.' "

Davis informed Churchill that the decision to terminate her was final, and that her only recourse was to talk with Hopper about it. Believing that Hopper, the Hospital C.E.O., would be fair and impartial and being unaware of the fact that he was involved in the decision to terminate her (including participating in the process of preparing the record to justify the termination), Churchill appealed the discharge to him. On February 6, 1987 Churchill met with Hopper and Magin in what turned out to be a star-chamber proceeding. In her handwritten notes of the meeting, Churchill stated that Hopper made clear that the discussion would be limited to a) the written warning she received, b) the negative comments on her December 1986 evaluation and c) the incident when she criticized Waters and Davis to an unidentified cross trainee in obstetrics one evening (Hopper did not inform her when the conversation took place). Hopper asked her specific questions about the written warning as well as the negative comments on her latest evaluation, but when she attempted to raise the issues she allegedly discussed with Perkins-Graham regarding the inadequacies of the cross-training program, Hopper "said he didn't want to get into that . . . ." In a letter dated February 12, 1987, Hopper informed Churchill that her termination was final:

> "In view of the seriousness of the latest reported incident and the fact that you previously received a written warning on August 25, 1986, as well as continued written counseling on your January 5, 1987 performance appraisal, I find that the decision to terminate your employment at McDonough District Hospital was appropriate."

Churchill filed her complaint in the federal district court in Peoria, Illinois pursuant to 42 U.S.C. § 1983 alleging

that in terminating her, the defendants violated her First Amendment right to free speech as well as her right to freedom of expressive association with Dr. Koch. After the preliminary skirmishes and the district court's partial grant of the defendant's first motion for summary judgment, *see Churchill v. Waters*, 731 F. Supp. 311 (C.D. Ill. 1990), Churchill moved for limited summary judgment on her free speech claim on the ground that the defendants violated her First Amendment due process rights in that they discharged her because of her speech regarding a matter of public concern (namely substandard implementation of cross training) without determining whether she was engaged in protected speech. The defendants moved to dismiss Churchill's freedom of expressive association claim for a failure to state a claim upon which relief could be granted, and for summary judgment on her free speech claims, on the ground that the speech was not protected speech, and even if it were, the defendants did not fire her for speaking out on a matter of public concern but for undermining the authority of the hospital administration. The district court a) dismissed Churchill's freedom of association claims for failure to state a claim upon which relief can be granted; b) entered summary judgment on behalf of the defendants on Churchill's free speech claim, holding that Churchill's statements were not protected speech as a matter of law, and even if they were, the hospital's interest in maintaining harmony among the workers and encouraging good working relationships among the employees and supervisors outweighed Churchill's interest in expressing her opposition to the cross-training policy to her co-worker; and c) denied Churchill's motion for partial summary judgment on her First Amendment due process claim without discussion.

II. ISSUES

The issues on appeal are: 1) whether the district court inappropriately resolved material issues of fact against Churchill in holding that her speech was not a matter of public concern; 2) whether the defendants' failure to deter-

mine whether Churchill's conversation with Perkins-Graham was on a matter of public concern violated Churchill's First Amendment due process rights; and 3) whether the individual defendants are entitled to qualified immunity from Churchill's § 1983 claims.[6]

III. MATTER OF PUBLIC CONCERN

The defendants admit that they fired Churchill because of her conversation with Perkins-Graham on January 16, 1987, but they contend that the district court was correct in holding that Churchill's conversation was not protected under the First Amendment. Churchill argues that the district court's holding that her speech was not protected was erroneous because the judge resolved genuine issues of material fact adversely to her in granting the defendants' motion for summary judgment. We agree. Public employees may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operations of the public [entity] in which they work." *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734 (1968). Furthermore, "a public employee [does not forfeit her] protection against governmental abridgement of freedom of speech if [s]he decides to express [her] views privately rather than publicly." *Greenberg v. Kmetko*, 840 F.2d 467, 472 (7th Cir. 1988) (quoting *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414, 99 S. Ct. 693, 696 (1979)). But in order for Churchill's speech to be protected, it must be capable of being "fairly characterized as constituting speech on a matter of public concern[; otherwise] it is unnecessary for us to scrutinize the reasons for her discharge." *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690 (1983). While we review the entire record in order to determine whether Churchill's speech is a matter of public concern, *see id.* at 147-48, 103 S. Ct. at 1690, we may not resolve disputed issues of fact in order to come to a conclusion in our review of the district court's grant of summary judgment. *See* Fed. R. Civ. P. 57(c). The *status* of Churchill's speech is a question of law, *see Phares v. Gustafsson*, 856 F.2d 1003, 1007 (7th Cir. 1988), but in this case, where the *content* of the speech is in dispute, the substance of the speech is a question of fact for the jury to resolve. "In reviewing a grant of summary judgment, we must view the record and all inferences drawn therefrom in the light most favorable to the party opposing the motion. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962)." *Beard v. Whitley County, REMC*, 840 F.2d 405, 409-10 (7th Cir. 1988). After reviewing the record and considering all reasonable inferences therefrom in the light most favorable to Churchill, it is evident that the District Court's grant of summary judgment was in error, for according to Churchill's version of her statements, she was speaking out on improper nurse staffing policies at McDonough District Hospital that endangered the quality of patient care, an issue that is most certainly a matter of public concern.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48, 103 S. Ct. at 1690. We have previously "recognized that content is the great-

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[6] Churchill also asserts that the district court's dismissal of her claim that her termination deprived her of her right to expressive association was in error because the defendants *perceived* her as being associated with Koch in opposition to the cross-training policy. Her failure to develop the argument (which the district judge rejected) that the defendants' perception of her association with Koch is adequate to establish an association "for the advancement of beliefs and ideas," *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163, 1170 (1958), constitutes waiver. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) (undeveloped arguments are waived). Furthermore, we agree with the district judge that the right to expressive association "is not implicated when two persons simply hold common beliefs or even when those different person[s] express those common beliefs—they must join together 'for the purpose of' expressing those shared views." Mem. Op. at 14.

est single factor in the *Connick* inquiry." *Berg v. Hunter*, 854 F.2d 238, 243 (7th Cir. 1988). Churchill's deposition version of the January 16, 1987 conversation was that "practically the entire conversation related to cross training and inadequate staffing, pulling of staff. The entire conversation almost, the majority of it consisted of speaking into [sic] terms of patient care and our concerns regarding that." Churchill stated that it was her recollection that she said the cross-training program

> "wasn't fair to patients because when a nurse was in to take of a patient or anyone who goes in to take care of a patient, that patient assumes that that person who is delivering health care to them is knowledgeable and knows what they are doing. They expect them to be able to care for them in a routine fashion and also to be knowledgeable enough to administer care to them should an emergency develop."

Churchill recalled that during the conversation, she, Perkins-Graham and Koch agreed

> "that cross-training could be useful but only if it was implemented with properly structured teaching and a regular frequent exposure to the department. In other words, you could not use a specialty area or really any area of the hospital, I don't think, to just send nurses there so they wouldn't have to go home on a low census day so that they could make money rather than go home without making any money."

In discussing what she believed to be inadequate staffing, Churchill allegedly said that she believed patients were at risk because there were not enough nurses. Churchill further related that she discussed the hospital's violation of state regulations with Perkins-Graham:

> "I mentioned that there is a regulation and it's contrary to pulling people from OB to go to another area of the hospital to work and then come back because once you're assigned to the obstetrical department, you're to be assigned there for the entire evening. If you leave, you are not to come back. They, they

> being administration I suppose, I don't know where the policy came from, they got around that by saying that the person when returning from another area of the hospital would have to shower and change clothes, but that requires time, five, ten minutes, which if you have got a real emergency going, you don't have five or ten minutes for that."

In her complaint, Churchill alleged that during the conversation, she

> "charged that the Defendants WATERS and DAVIS ineffectively administered the nursing function of said Hospital, in particular the Obstetric Wing thereof, with respect to the duties, powers, and mission of the Hospital to discharge its responsibility to provide cost effective, high-quality health care services and products embracing all of the patients' needs, to improve patient care through 'state of the art' health care delivery systems, and to maintain an environment inspiring creative approaches by the medical and nursing staffs to complex health care challenges."

Accepting Churchill's version of the conversation as true (Dr. Koch as well as nurse Welty, who overheard the conversation, corroborated Churchill's version), she was undoubtedly speaking about a matter of public concern. There can be no doubt that when questioning the hospital's violation of state nursing regulations as well as the quality and level of nursing care it provides its patients, the nurse is speaking about matters of public concern. *See Frazier v. King*, 873 F.2d 820, 825 (5th Cir. 1989). Furthermore, accepting Churchill's description of the cross-training program as accurate, we are concerned whether the hospital's implementation of cross-training actually complies with the accreditation standards promulgated by the Joint Commission on Accreditation of Healthcare Organizations.[7] A

[7] The Joint Commission's accreditation rules are an authoritative source of which we may take judicial notice. *See Bethel Conservative Mennonite Church v. Commissioner of Internal Revenue*, 746 F.2d 388, 392 (7th Cir. 1984).

hospital that is well qualified for accreditation must assign clinical responsibilities in accordance with "the complexity and dynamics of the condition of each patient to whom the individual is to provide services and the complexity of the assessment required by each patient . . . ." *Accreditation Manual for Hospitals*, NC.2.1.2.2 (1992). In order to be competent to fulfill their assigned responsibilities,

> "[n]ursing staff members [should] participate in orientation, regularly scheduled staff meetings, and ongoing education designed to improve their competence.
>
> . . . .
>
> NC.2.3.3 If a nursing staff member is assigned to more than one type of nursing unit or patient, *the staff member [must be] competent to provide nursing care to patients in each unit* and/or to each type of patient.
>
> NC.2.3.3.1 *Adequate and timely orientation and cross-training [must be] provided as needed.*

NC.2.3 (emphasis added). The record seems to indicate that in the hospital's implementation of cross-training, it neither assured that each cross trainee was "competent to provide nursing care to patients in each unit" nor provided "[a]dequate and timely orientation." From our review of the record, the cross-training program provided very little, if any, education or training to prepare cross trainees for dealing with the complexities and dynamics of patient care in obstetrics. Churchill asserts that nurses untrained in the specialty of obstetrics were sent to OB on an unscheduled basis (in order to avoid sending them home when their departments were over staffed) to follow the regular obstetric nurses around. This is contrary to the assumption in the accreditation manual that in a well-managed hospital environment, "[n]ursing department/service assignments in the provision of nursing care are commensurate with the qualifications of nursing personnel and *are designed to meet the nursing care of patients*." NR.4 (emphasis added). As Churchill alleges, McDonough District Hospital's cross-training policy appears to have been

implemented merely to meet the bottom-dollar concerns of the hospital administration rather than the "nursing care of patients." We are not about to criticize a hospital administration for running a cost-efficient medical facility; however, we have serious reservations about the questionable practice of transferring nurses from one discipline to another without adequate education and training, thus possibly jeopardizing the health and welfare of its patients, and thereafter discharging an employee who properly points out the problems with the cross-training policy as implemented. In these days of highly technical medical procedures such as in vitro fertilization, obstetric and gynecological surgery (cancer), orthopedic surgery (hand, knee, leg), spinal surgery, cardiovascular surgery, ophthalmological surgery (detached retina) and heart, kidney, pancreas and liver transplants, nurses require specialized training before they are assigned to new areas. The failure to properly educate and train nurses in such highly specialized areas is most assuredly a matter of public concern.[8] Since Churchill's

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[8] A statement of another state's regulatory agency, namely the Wisconsin Board of Nursing, dealing with floating or transferring nurses from one discipline to another without proper training further buttresses our discussion and holding that Churchill's conversation in regard to the cross-training policy is a matter of public concern:

> "At times nurses are 'floated' to units needing staffing assistance or they are asked to provide nursing care in settings which are not their primary areas of employment. *Competence to perform safely in a particular area of nursing practice is based upon appropriate education, training or experience.*
>
> "[A] nurse may be found negligent and may be disciplined by the board for 'offering or performing services as a licensed practical nurse or registered nurse for which the licensee or registrant is not qualified by education, training or experience.' *A nurse is not necessarily qualified or competent to practice in any area of nursing simply because the nurse has graduated from a school of nursing and has passed the licensure exam.* Therefore, employers and nurses themselves are accountable for determining competence to practice in a particular area of

(Footnote continued on following page)

version of her conversation with Perkins-Graham (alleging that she was discussing this crucial matter of public concern) stands in stark contrast to the versions reported by Mary Lou Ballew and Perkins-Graham (who described the conversation as a "bitch session"), the content of the speech is a question of fact for the jury. The district court erred in taking it upon itself to resolve this disputed issue of material fact against Churchill.

The trial judge held that even if Churchill's conversations involved matters of public concern, the hospital was justified in discharging her because the hospital's legitimate interest as articulated in *Pickering v. Board of Education* outweighed Churchill's interest in expressing her opinion. We have summarized the balancing approach of *Pickering* as follows:

> "(1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the [employee's] proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence."

Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973). The district judge held that in applying these factors

> "it is clear that the balancing favors the Defendants. Factors (1) and (4) deal with the need to foster healthy working relationships between an employee and her supervisors and co-workers. *In this Court's opinion the type of criticism which Churchill voiced to Perkins-Graham about her superiors was inherently disruptive to these interests and justified termination.* Thus, even if Churchill's remarks to Perkins-Graham were protected speech on matters of public concern, the Defendants would be entitled to summary judgment under the *Pickering* balance."

(emphasis added). This holding is erroneous because it is based on inferences from the record that are adverse to Churchill. In Jean Welty's deposition she describes the conversation between Churchill and Perkins-Graham as follows:

> "[Perkins-Graham said], 'Well, she only had one reservation and that was Cindy [Waters].' She had heard some negative things, very negative things about her all over the hospital and a lot of people didn't seem to like her. Cheryl [Churchill] spoke up and said, 'Oh, no, she has her moods but you just learn to pay, not pay attention to them and stay out of her way. And you will be fine when she gets moody. It's a big job,' she said, 'and sometimes it wears her down.'
>
> "Q Okay. Did you ever hear Cheryl Churchill make any comments derogatory of Cindy Waters?
>
> "A No.

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[8] *continued*

> specialty. . . . If an employer wants a nurse to rotate to an area that is not the nurse's usual area of assignment, then the employer should provide for the nurse's further education and training to prepare the nurse to work in the area.
>
> "Education, training or experience preparing the nurse to practice in situations outside the nurse's primary area of employment should be documented and kept on file by the nurse's employer."

Wisconsin Board of Nursing, *Wisconsin Regulatory Digest*, Vol. 1, No. 1, 2-3 (March 1988) (emphasis added). The Board has further stated:

> "When nurses are confronted with situations wherein they are asked to provide services for which they do not feel competent, they have a responsibility to decline to do so. . . ."
>
> "The board prohibits nurses who are not competent in methods of practice from performing nursing care. Protection of the public health and safety is the primary charge of the board, and it sees this charge as essential in the provision of all nursing care."

Id., Vol. 3, No. 1 at 2 (March 1990).

"Q At any time during the remainder of that shift did you hear Cheryl Churchill make any comments derogatory of Cindy Waters?

"A No."

In view of this testimony as well as Churchill's testimony that she told Perkins-Graham that she "didn't have any problem" with Waters and that she and Waters did and could "continue to have a good working relationship, professional working relationship," we believe the district judge erroneously resolved a genuine issue of material fact regarding whether Churchill's speech was critical and disruptive of the hospital's interests in a manner adverse to Churchill.

The district judge resolved a second issue of fact adversely to Churchill when he found that her "objective was not to inform but rather to gripe."

> "[T]he *Connick* test does not consist in looking at what might incidently be conveyed by the fact that an employee spoke in a certain way. The test requires us to look at the *point* of the speech in question: Was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?"

Zaky v. United States Veterans Admin., 793 F.2d 832, 838 (7th Cir. 1986) (citation omitted) (emphasis in original). Churchill argues that the point of her speech was to bring the violation of state nursing regulations to light and to discuss the risks to patients because of the inadequacy of the hospital's cross-training policy, while the hospital asserts that the tenor of the conversation was to express antagonism to the administration. The determination of such an issue is best resolved through giving the judge or jury the opportunity to observe the verbal and nonverbal behavior of the witnesses focusing on the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture

and body movements, rather than looking at the cold pages of depositions, which is all the court had before it on the summary judgment motion. A witness's behavior during the trial can very well reveal deception or untruthfulness through evasiveness on the witness stand that is more frequently than not undiscernible in the pages of a deposition. It was inappropriate for the district court to make credibility judgments of this nature when deciding the motion for summary judgment.

The district court not only made improper credibility determinations in holding that the *Pickering* tests favored summary judgment for the defendants, it also ignored Churchill's interest in fulfilling her ethical duty as a nurse to speak out on what she believes to be a matter of public concern that is related to the safety and proper care of the patients entrusted to her care.

> "The nurses's primary commitment is to the health, welfare, and safety of the client. As an advocate for the client, *the nurse must be alert to and take the appropriate action regarding any instances of incompetent, unethical, or illegal practice by any member of the health care team or the health care system, or any action on the part of others that places the rights or best interests of the client in jeopardy. . . .*"
>
> "When the nurse is aware of inappropriate or questionable practice in the provision of health care, concern should be expressed to the person carrying out the questionable practice and attention called to the possible detrimental effect upon the client's welfare."

American Nurse's Association, Code For Nurses with Interpretive Statements §§ 3.1-3.2 (1985) (emphasis added). Construing the record in the light most favorable to Churchill, we believe she was acting in strict accordance with the Code For Nurses. She identified and was trying to do something about the problems that had the potential of having detrimental effects on her patients—charging untrained nurses with patient care in obstetrics, understaffing the hospital and interfering with the duties of com-

petent nurses in obstetrics as the result of assigning cross trainees with a lack of education and skill to them. She also argued that the hospital was possibly in violation of state regulations when transferring nurses into and out of the obstetrics department during the same shift. 77 Illinois Administrative Code, Chapter I § 250.1530, Subchapter b, § f(1)(E). We wish to make it very clear that we do not condone an insubordinate or troublemaking employee, but Cheryl Churchill's actions fall far short of the actions of an insubordinate or problem employee. From our reading of the record, her concern was also that patient health care was endangered due to the controversial cross-training policy that transferred a nurse trained in obstetrics to another department (pediatrics, orthopedics) where that nurse was inadequately trained to give appropriate health care and then recalling her back to the obstetrics department during the same shift. *See id.*; (TR. Vol. II at 302-309, 317). In taking action to report this controversial practice, Churchill lived up to the highest ethics of her most noble profession. American Nurse's Association, Code For Nurses with Interpretive Statements §§ 3.1-3.2 (1985). Churchill took appropriate action in that she discussed her perception of the problems with Waters, her supervisor, and continued to lobby for change when nothing was done to remedy the situation. She also warned Perkins-Graham of the danger of her, as a cross trainee, supplying inadequate patient care. Churchill's interest in fulfilling her duties and obligations as an ethical, responsible professional, when viewed in this light, clearly outweighs the hospital's interests in interfering and ultimately preventing her from speaking out on important matters of public concern. Thus, we are of the opinion that the district court should have denied the defendant's motion for summary judgment.

We note that if the district court had considered the record in the light most favorable to Churchill, it would have concluded that the "history of hostility between Churchill and her supervisors" to which it referred was nothing but a one sided demonstration of hostility toward Churchill.

Up until the summer of 1986, when Churchill began opposing the newly instituted training program and she and Dr. Koch began developing their friendship, the relationship between Churchill and her supervisors was positive and congenial. On the December 1985 performance evaluation, Waters found Churchill's sense of humor to be noteworthy, and on three of her four evaluations through December 1985, Churchill's own responses in the section for employee comments included "smiley" faces, thereby revealing her cheerful attitude about her job. The first criticism in Churchill's file came in June of 1986 when Waters described her relationship with Dr. Koch as being unprofessional. It is certainly suspect that Waters' performance evaluations of Churchill plummeted (from positive to negative) almost contemporaneous with the time that Waters gained knowledge of Churchill's personal relationship with Dr. Koch, a physician who in the past had vigorously complained about how the inadequate nurse staffing had contributed to the birth of a brain damaged infant. Waters' disapproval of Churchill's personal relationship with Dr. Koch reveals that Waters considered Koch and Churchill to be "professional allies" jointly opposed to the hospital's cross-training policy. As an example of Waters' attitude towards her during this period of heightened analysis of the cross-training policy, on August 21, 1986, Waters ordered Churchill out of the delivery room to perform a routine check on another patient while Churchill was assisting Dr. Koch in an emergency (code pink) cesarean section procedure. It is well established that the control of the operating room is in the hands of the surgeon in charge. The surgeon is the "Captain of the Ship" in the operating room and in most instances is liable for the negligence of any personnel assisting in the operation. *See Berg v. United States*, 806 F.2d 978, 983 (10th Cir. 1986). Thus, the doctor performing an emergency C-Section has a legitimate expectation of being able to control and direct the nurses and the entire medical staff assisting in the operating room and to be able to count on them to effectively and professionally carry out their respective tasks.

Dr. Koch stated that Nursing Supervisor Waters "shouldn't have been in [the operating room]. Her presence was not needed and she should not have been there." He was "very angry because she was disturbing my operating room." As Dr. Koch argued to Waters and Harper in his meeting with them subsequent to the incident, he was the person in command and responsible for the operation as well as the personnel assisting, and it was his duty and responsibility alone to see that the nurses were carrying out their duties; Waters had no business whatsoever in interfering and disrupting the tense, highly-charged atmosphere in the C-Section code pink delivery room scenario where every movement and moment counts vis-à-vis the life of the baby and mother. Under the circumstances, a jury could very reasonably infer that Waters' conduct in ordering Churchill to leave the delivery room was the result of her personal animosity toward Churchill.

The record reveals that Waters' criticism of Churchill was primarily because she (Churchill) spoke against the cross-training policy out of her public concern that patient health may be jeopardized. In light of this record, Churchill's purpose and/or motive in making statements to Perkins-Graham about the problems the cross-training policy created in the obstetrics department and her comments about Cynthia Waters' involvement in the cross-training policy certainly present material issues of fact regarding the content of Churchill's speech. As we have established, the district judge obviously made a number of credibility judgments resulting in the resolution of factual issues adverse to Churchill. Since all reasonable inferences must be drawn in favor of the non-moving party on a summary judgment motion, the district court erred.

IV. FIRST AMENDMENT DUE PROCESS

The defendants argue that they have a complete defense to Churchill's claims because, as Churchill alleges, they were unaware of the actual content of her January 16, 1987 conversation with Perkins-Graham. Under *Mt. Healthy City*

School District Board of Education v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977), a plaintiff is obligated "to show that [her] conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor' " in the termination decision. Thus, the defendants contend, even if the discussion involved protected speech, Churchill has failed to demonstrate that the fact that she was discussing matters of public concern was a motivating cause of her termination. In order to get around this *Mt. Healthy* defense, the plaintiff argues that the hospital's failure to properly investigate the actual content of her speech violated her right to due process under the First Amendment. Notwithstanding the lack of a Due Process Clause in the First Amendment and the lack of case law holding that an at-will public employee has a right to a hearing before he or she may be discharged for engaging in protected speech, Churchill asserts that we must create such a right in order to protect the free-speech rights of public employees. She insists that otherwise employers may avoid liability for violating employees' free-speech rights through deliberate ignorance of the content of the speech, thereby creating a chilling effect on speech that opposes official policy. We disagree that it is necessary to create a First Amendment due process right in order to protect the rights of public employees to speak out on matters of public concern, for we believe that *Mt. Healthy* provides adequate safeguards regardless of whether the employer actually *knew* the precise content of the statements for which it fired the employee.

In *Mt. Healthy*, the Supreme Court considered the claims of a non-tenured teacher whom the school board decided not to rehire (and thus not grant him tenure). The Court ruled that this violated his free-speech rights because the decision was partially based on a conversation the teacher had with a local radio station announcer. The Court held:

> "Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been

> discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms."

Id. at 283, 97 S. Ct. at 574 (citations omitted).[9] The Court further held that the plaintiff must establish that he would not have been dismissed absent the constitutionally protected conduct:

> "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision."

Id. at 285-86, 97 S. Ct. at 575. Thus, when an employee claims to have been terminated for engaging in protected speech, the public employer must establish "by a preponderance of the evidence that it would have reached the same decision as to [the employee's termination] even in the absence of the protected conduct." *Id.* at 287, 97 S. Ct. at 576. The defendants allege they have carried that burden, for they allege that they fired Churchill for complaining in general rather than for engaging in conversation about the cross-training policy. But the point of *Mt. Healthy* is the "protected *conduct*," rather than the public

[9] We note that while the Court held the claims to be actionable, it did not establish any type of procedural protections and thus did not create a First Amendment due-process right.

employer's knowledge of the precise content of the speech. The hospital admits it discharged Churchill for her conduct in speaking with a fellow employee during a break because they viewed the speech as critical and disruptive. If on remand the jury determines that the point of Churchill's conversation was to raise the issues of inadequate nurse staffing resulting in inept patient care and even danger to patients because of the allegedly ill-conceived and inept cross-training policy rather than simply to complain, then she was engaged in protected conduct. We hold that when a public employer fires an employee for engaging in speech, and that speech is later found to be protected under the First Amendment, the employer is liable for violating the employee's free-speech rights regardless of what the employer *knew* at the time of termination. If the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct, the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental.[10]

V. IMMUNITY

The individual defendants argue that they are entitled to qualified immunity from Churchill's claims because there was no clearly established law at the time of her discharge (or now) holding that it would be unconstitutional to fire her for the conduct that was reported to them.

[10] We note that the defendants misrepresent the record when they claim that they gave Churchill the same due process that she would have been entitled to receive if she possessed a property right in her employment. Although Davis and Waters met with Churchill prior to termination, and Hopper and Magin met with her later, no one informed her that she was being discharged for her January 16, 1987 conversation with Perkins-Graham. Furthermore, there is no evidence in the record that Churchill's supervisors followed the hospital's general guidelines for discipline (*see supra* n. 5) and gave her an oral warning prior to her first written warning or counseling thereafter.

> "[G]overnment officials performing discretionary functions are shielded from liability for civil damages unless their conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). The principle behind the doctrine is that '[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.' *Id.*"

Greenberg v. Kmetko, 840 F.2d 467, 472 (7th Cir. 1988). The employee must allege that the public employer violated a specific right rather than a generalized or abstract one:

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent."

Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987) (citations omitted).

The individual defendants rely upon our statement in *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988), that "the test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted." *Id.* (quoting *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987). They assert that at the time of termination, the fact confronting them was that Churchill "had made negative and inappropriate comments about Waters and Davis" that they believed was interfering with working relationships in the hospital. Thus, as in their *Mt. Healthy* defense, the individual defendants would have us focus on what they knew (or did not know because they failed to conduct a thorough

and impartial investigation) about the content of the conversation rather than the fact that they admittedly fired Churchill for her speech. In our opinion, the defendants' argument is misdirected, for the "specific fact[ ] confronting the public official[s]" was that Churchill was accused of engaging in speech that was critical of the administration of the hospital, and in 1987 the law was clear that the speech of public employees while at work was protected under the First Amendment if it was about matters of public concern in connection with their workplace. *See Pickering*, 391 U.S. at 568, 88 S. Ct. at 1734; *see also Egger v. Phillips*, 710 F.2d 292, 314 n.26 (7th Cir. 1983). Thus, "a reasonable official [sh]ould [have] underst[ood] that what he [was] doing violate[d]" the employee's free speech rights if he fired her for speaking out on a matter of public concern. *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039. We believe it is immaterial that the defendants were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern—for while we decline to impose a due process requirement that public officials investigate the precise content of an employee's alleged complaint, we hold that ignorance of the nature of the employee's speech (in particular in light of the record before us) is inadequate to insulate officials from a § 1983 action.[11]

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[11] The defendants also argue that the hospital is not amenable to suit under § 1983 because it does not have the official policy Churchill alleges, i.e., "that employees could discuss only with supervision matters pertaining to the employees' or the hospital's welfare." The district court did not address this issue, and we are unable to determine the actual hospital policy, for while the personnel policy cited does not explicitly require employees to discuss hospital problems with supervision alone, there is deposition testimony from personnel manager Bernice Magin as well as from the defendant Hopper suggesting that such a policy exists. Regardless of the specific policy, we have serious reservations about whether the defendants can prevail on this defense, for Hopper, the hospital administrator, has the responsibility of "[s]electing, employing, controlling, and discharging employees and developing and maintaining

(Footnote continued on following page)

VI. CONCLUSION

It is most disheartening to witness this scenario of combat and distrust occurring in far too many hospitals today across our country and is achieving nothing, but to exacerbate the nation's health care problems for hospital administrators are all too often turning a deaf ear to the needs and recommendations of the medical and nursing staffs. It is nothing but a turf battle between the administrators and their respective governing boards versus the health care professionals. This conflict does nothing for, and in fact interferes with and stifles, the health professional's interest and dedication in rendering the optimum of well-accepted patient care within the proper cost guidelines and at the same time without emasculating the employees' rights to express their constitutionally protected views on matters of public concern. This very delicate balance between the administrators, the hospital's board and the health care professionals must be maintained and fostered by all parties for the good of the patients in their care.

We hold that the district court erred in granting summary judgment on behalf of the defendants, for there are genuine issues of material fact in dispute regarding the content of Churchill's speech. If the jury finds that Churchill's

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[11] *continued*
personnel policies and practices for the Hospital." McDonough District Hospital By-Laws, Article IX, § 2, ¶ (D). As Hopper was involved in the decision to fire Churchill (and was the supposed independent reviewer of the decision), the termination may be considered to have been carried out pursuant to hospital policy. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 924 (1988) ("officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability.") (plurality opinion). Incidentally, since the individual defendants are not immune and Illinois indemnifies public employees for judgments against them for their actions within the scope of their employment, *see* Ill. Rev. Stat. ch. 85 ¶ 9-102, it makes little difference in this case whether the hospital itself is subject to suit.

version of the January 16, 1987 conversation is true, the defendants will be liable for damages for retaliatory discharge unless they can establish that their interest in controlling the workplace under the *Pickering* test outweighs Churchill's interest in speaking out on matters of patient safety. We further hold that it is immaterial whether the defendants knew (or deliberately ignored) the precise content of Churchill's conversation, for they knew or should have known from the state of the law as of that date that they were terminating her for engaging in speech that may have been protected under the First Amendment; and that the right of public employees to speak out on matters of public concern was established long before 1987. The judgment of the district court dismissing Churchill's free-speech claims is REVERSED AND REMANDED pursuant to Circuit Rule 36 for further proceedings consistent with this opinion.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois

December 9, 1992

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

CHERYL R. CHURCHILL and
THOMAS KOCH, M.D.,

Plaintiffs-Appellants,

No. 91-2288 v.

CYNTHIA WATERS, KATHLEEN DAVIS,
STEPHEN HOPPER, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois
No. 87 C 1117—Michael M. Mihm, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

[DATED MAY 17, 1991]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,	)	
Plaintiffs,	)	
v.	)	Case No. 87-1117
CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,	)	
Defendants.	)	

ORDER

Before the Court are the Defendants' Motion to Dismiss and Motion for Summary Judgment as well as the Plaintiff's Motion for Summary Judgment. For the reasons set forth, the Defendants' Motions are granted and the Plaintiff's Motion is denied.

FACTUAL BACKGROUND

The pertinent facts of this case were previously outlined in this Court's order of February 16, 1990. For convenience, that section is reprinted here.

Cheryl Churchill was hired as a part-time nurse in Obstetrics by McDonough District Hospital ("MDH") on October 25, 1982. On September 16, 1985 she began work as a full-time nurse in Obstetrics. On January 27, 1987 she was discharged by the hospital.

In April of 1986 Defendant Kathy Davis was hired by MDH as Vice-President of Nursing. Soon after her appointment, Davis made a number of changes in nursing practices, including the implementation of what is known as "cross-training." Cross-training involved pulling full-time nurses from general medical areas of the hospital and training them in more specialized nursing areas, such as obstetrics, so that the cross-trainees could provide flexible staffing as needed. The institution of this new policy was rather controversial, triggering a certain amount of controversy and discussion among medical and nursing staff at the hospital.

Among those opposing cross-training was Churchill, while the individual Defendants all supported it. According to Churchill, she participated in a number of conversations about cross-training with other staff of the hospital.

On August 21, 1986 a medical emergency ("code pink") developed in the Obstetrics Department. The doctor on duty was Thomas Koch, M.D., the clinical head of the Obstetrics Department. A probationary employee, Mary Lou Ballew, was ordered by Dr. Koch to sound the alert for the "code pink." She did not know what to do and failed to alert all the necessary medical personnel. Koch directed Churchill to prepare the delivery room for the impending emergency Caesarean Section and then himself secured the "code pink" alert.

During the surgical procedure, Defendant Cynthia Waters arrived in the delivery room. She asked Churchill about one of Churchill's patients who had recently delivered and was in the recovery room. Churchill checked on the patient and returned to the delivery room. Once again, Waters asked her about her patient. In response, Churchill said, "You don't have to tell me how to do my job." At that

point, Dr. Koch reprimanded Waters, informing her that she was out of line in interfering with his orders to Churchill. Nonetheless, Churchill left the delivery room. After the operation, Dr. Koch again approached Waters to discuss her conduct. Waters, however, would not discuss the matter with Koch. Instead, she contacted Defendant Stephen Hopper, the President and CEO of MDH.

Subsequently, Hopper held a conversation with Koch and Waters, as well as another nurse, Marsha Clausen. Dr. Koch not only complained about Water's behavior, but expanded the conversation to include general complaints about the new nursing policies implemented by Davis and Waters.

Kathy Davis, who had been unavailable for that meeting, was contacted by Hopper and Waters later. Hopper, Davis, and Waters met on August 22 and August 25, 1986, and decided to issue a written warning to Churchill for insubordination based on her response to Waters in the delivery room. The written warning was presented to Churchill on a special form on August 25. The warning read as follows:

> REASON FOR WARNING: (1) Insubordination—when had to be asked twice to leave the delivery room, you responded to me [Waters] in a very hostile manner, "I don't need you to tell me how to do my work." (2) General negative attitude and lack of support toward nursing administration in the OB Department.
>
> WARNING GIVEN: Insubordination and/or lack of cooperation will not be tolerated in the future as it is very detrimental to the operations of the OB Department. Any future occurrence of this behavior will be subject to further disciplinary action which may include assignment to another nursing area or discharge.

In Churchill's deposition she acknowledged that, although she could have submitted a written response, she chose not to do so saying that she did not wish "to make mountains out of molehills." She also did not file a grievance protesting this warning.

On January 5, 1987 Churchill received her annual evaluation from Waters. The evaluation showed standard or strong performances in every area of the evaluation and reflected no areas of weakness. At the end of the evaluation, Waters wrote:

> Cheryl exhibits negative behavior towards me and my leadership—through her actions and body language, i.e. no answer, one word abrupt answers followed by turning and leaving, blank facial expressions, or disapproving facial expressions. This promotes an unpleasant atmosphere and hinders constructive communication and cooperation.

In the conversation between Churchill and Waters which accompanied the evaluation, Waters did not mention the handwritten comments at the end of the evaluation, and Churchill made no response either orally or in writing nor did she file a grievance.

On January 16, 1987 Cheryl Churchill began work on the 3:00 to 11:00 p.m. shift. The nurse in charge was Jean Welty. Other nurses working the same shift included Mary Lou Ballew and Melanie Perkins-Graham. Following departmental custom, Churchill and Perkins-Graham were eating their dinner in a kitchen area situated behind the main nurse's station in Obstetrics. Ballew and Welty were at the main desk. Dr. Koch walked into the department and went into the kitchen area where Churchill and Perkins-Graham were eating. Welty remained at the front desk while Ballew (the nurse present in the delivery room during the previously discussed incident involving Churchill,

Koch and Waters) heard parts of the subsequent conversation in the kitchen; however, she was not at the desk or in the kitchen area for the entire course of the conversations since she was answering patient lights and performing other nursing duties.

Perkins-Graham told Koch that she was in the department for cross-training and was thinking about transferring to Obstetrics permanently. The subsequent conversation involved general criticisms and comments about the cross-training policy. Welty overheard Koch express his general views about cross-training and his reasons for disliking that policy. She also heard Churchill agree with Koch and say that Kathy Davis's policy was going to "ruin the hospital," and that some aspects of the cross-training program might violate certain state regulations. Welty also heard Perkins-Graham contribute her views to the conversation, and indicate that, while she was interested in transferring to the OB Department, she was reluctant because she had heard so many bad things about Cindy Waters. Welty heard Churchill encourage her to transfer, saying that Cindy Waters had a hard job but good intentions and that she was sometimes moody.

Ballew overheard only segments of this conversation. Apparently, she construed those portions she heard as negative and intended to dampen the enthusiasm of the cross-trainee, Perkins-Graham. Because of this, Ballew reported the conversation to Waters, who went to Hopper on January 21 and advised him of the conversation. Hopper, who wanted to include Kathy Davis, held a meeting the next day at which Davis, Waters, and Hopper decided to talk to Perkins-Graham. On January 23, Perkins-Graham was summoned to Davis's office. When she arrived, accompanied by her supervisor, she agreed that Churchill had said unkind and inappropriate negative things about

Cindy Waters and had said that things in general were not good in OB as a result of hospital administration policies. She repeated Churchill's comment about Kathy Davis "ruining the hospital" but admitted that she could not remember the conversation very specifically.

On January 26, 1987, Waters, Davis, Hopper, and Bernice Magin (Personnel Director of MDH) held a meeting at which they decided to discharge Churchill. The next day when Churchill arrived at work, Waters summoned her to Davis's office. There, Churchill was advised by Waters that, because she had continued to undermine the department and the hospital administration, Waters had no choice but to fire her. Bernice Magin explained how Churchill's benefit package would work following her discharge, discussed her final paycheck, and later explained to her the grievance procedure at the hospital.

Pursuant to the hospital's grievance procedure, Hopper reviewed the grievance Churchill filed. Churchill did not know and was not told of Hopper's involvement in the decision to fire her. Hopper decided that there had been three warnings beginning with the written warning following the delivery room incident. The second warning, he concluded, was the written criticism at the end of Churchill's evaluation. He concluded that Churchill's conversation on January 16 was a third offense within 12 months and therefore upheld the discharge.

At his deposition, Hopper testified that he found Churchill's comments about Davis and Waters objectionable not only because of their negative, insubordinate content, but also because she was voicing her concerns during working hours to the wrong forum. He viewed Churchill's conflict with Waters as a personal dispute which interfered both with department operations and with the hospital's cross-training policy.

PROCEDURAL HISTORY

Churchill initially filed a four-count complaint against the Defendants. Counts I and III charged that the individual Defendants and MDH violated her First Amendment rights by firing her in retaliation for the comments she had made about hospital staff and policies. Count II charged that the individual Defendants' conduct also violated her Fourteenth Amendment rights to due process. Count IV alleged a common law breach of contract against MDH. After this Complaint had been amended once, the Defendants filed a joint Motion for Summary Judgment. By its order of February 16, 1990, this Court granted the Defendants' Motion as to Counts II and IV, but denied it with respect to the First Amendment charges of Counts I and III, finding that disputed issues of material fact still existed with respect to those claims.

After reconsideration motions were heard and denied and as the case was proceeding through a continued final pre-trial conference on September 5, 1990, Churchill moved to file a Second Amended Complaint. This new Complaint sought to add Dr. Thomas Koch as a party Plaintiff and to add a new Count V to the existing Complaint. Over the Defendants' objection, this Court granted leave to file the Second Amended Complaint on September 17, 1990. Count V added essentially three new components to the Complaint. First it alleged that the Defendants had violated Koch's First Amendment rights by delaying the renewal of his hospital staff privileges in the fall of 1986. Secondly, it alleged that the Defendants were taking measures to amend the hospital's medical staff by-laws to facilitate efforts to restrict Koch's staff privileges. Finally, Count V also alleged that the Defendants, by taking such adverse actions against Churchill and Koch, had violated

their First Amendment right to freedom of expressive association.

Shortly after this Second Amended Complaint was filed, the Defendants filed a counterclaim against Koch for indemnity. The counterclaim alleged that any and all emotional injuries suffered by Churchill were due to Koch's deficient and improper treatment of Churchill's psychological problems. The Defendants then filed the pending motions for dismissal of Count V and for summary judgment as to Counts I and III. Churchill then filed her pending Cross-Motion for Summary Judgment as to Count I. While these Motions were being briefed by the parties, the Plaintiffs filed a Third Amended Complaint, admittedly intended to cure possible defects in Count V. The issues presented are, to say the very least, fully briefed and ready for disposition.[1]

DISCUSSION

I. *Motion to Dismiss Count V*

The Defendants move to dismiss Count V on the grounds that all of Koch's allegations of free speech deprivation lack the constitutional prerequisite of "case or controversy" and that Churchill's and Koch's combined claim for violation of First Amendment right to freedom of expressive association fails to state a proper claim for relief. The Defendants argue that, once these allegations are dismissed from Count V, all that remains are claims of free speech violations against Churchill which are duplicative of Counts I and III. This Court agrees in all respects.

[1] It should be noted that many trees were sacrificed to fuel the legal battle in this lawsuit. Reams upon reams of paper are contained in the file jackets of this case, which currently occupies one full file drawer (27" deep) in the Clerk's Office. In addition to lengthy initial briefs and responses on their respective motions, the parties here have filed replies, sur-replies, and responses to those sur-replies. Motions for leave to file supplemental authority have arrived on the courthouse steps with regularity, as well as occasional statements of clarification.

A. *Case or Controversy*

At the time the Defendants' Motion to Dismiss was filed on October 9, 1990, the Plaintiff's Second Amended Complaint was operative. In Count V of that Complaint, Koch alleged that the Defendants *attempted* to deny him a renewal of his hospital staff privileges in 1986 in retaliation for Koch exercising his First Amendment right to free speech. Although his staff privileges were actually renewed, Koch alleged that he had become, in the process, inhibited from expressing his views and therefore sought injunctive relief against the Defendants, prohibiting them from punishing him for the exercise of his First Amendment rights in the future. The Defendants' Motion to Dismiss argued that these allegations contained no case or controversy as required by Article III of the Constitution because Koch's privileges had actually been renewed.

Koch's response to this Motion conceded that the allegations concerning the 1986 renewal of staff privileges failed to bring forth an actual case or controversy, and submitted the Plaintiff's Third Amended Complaint to cure this defect. In this Third Amended Complaint, Koch alleged that the hospital, through its CEO, was attempting to change its by-laws "so as to permit greater ease in denying or restricting staff privileges to doctors on the medical staff who oppose hospital policies." The new Count V did not allege that these new by-laws had been enacted or were being enforced, but rather alleged that they had been sub-

mitted to the hospital administration for review and possible implementation. To date, Koch has not alleged or argued that these new by-laws have been enacted or enforced.

In their reply memorandum, the Defendants asserted that the allegations of Koch's Third Amended Complaint failed to cure the case or controversy deficiency. The Defendants argued that the possibility of by-law changes which might result in deprivation of Koch's First Amendment rights does not create a current injury required for a justiciable controversy. As the Defendants phrased it, the "Defendants are claiming that [the hospital CEO] has been attempting (thus far unsuccessfully) to do something which, if successful, will make it easier to do something in the future."

It is well-settled that federal courts only possess jurisdiction over actual cases or controversies.

> It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy. Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional question. Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (citations omitted). Moreover, to possess standing, a plaintiff must be able to demonstrate that the injury he has sustained is likely to be redressed by a favorable decision. *Valley*

Forge College v. Americans United for the Separation of Church and State, 454 U.S. 464, 472 (1982). The requirement of an actual or threatened injury is not satisfied where a plaintiff alleges only that a rule is in power which *may* serve to violate his constitutional rights. *See Council No. 34, American Fed. of State, C. and M. Emp. v. Olgivie*, 465 F.2d 221, 225-26 (7th Cir. 1972).

Koch cannot satisfy this requirement. He conceded, as he must, that no actual injury arose from the staff privilege's review in 1986 because those privileges were actually renewed. But further, Koch's new allegations that the proposed by-law amendments *might* serve, *if* adopted, to curtail his First Amendment rights fails to establish an injury as required by the authorities noted above. The Defendants accurately summed up the deficiencies of Koch's claims in this regard:

> But even if [the hospital CEO] were to succeed tomorrow in persuading the appropriate decision makers to amend the medical staff by-laws, Koch would suffer no injury from the fact of the amendment. If the medical staff by-laws are amended, and if they make it easier to remove physician's staff privileges, and if an attempt is made to remove Koch's staff privileges, and if that attempt is motivated by Koch's protected speech, Koch can have his day in court. But until all those "ifs" become reality (or at least a "real and immediate" threat), Koch has no standing under Article III.

Defendants' reply memorandum in support of Motion to Dismiss Count V of Third Amended Complaint, filed October 29, 1990, at p. 5.

B. *Failure to State a Proper Claim*

With Koch's allegations dismissed for lack of case or controversy, the focus on Count V shifts to the injuries

alleged therein by Churchill. Churchill alleges that her termination by the Defendants also amounted to a deprivation of her First Amendment right to freedom of "expressive association." The Defendants argue that this claim cannot survive because Churchill has failed to state a proper claim for the violation of this right.

The right to "expressive association" is a "judge-made corollary" to the free-speech clause of the First Amendment. *See Swank v. Smart*, 898 F.2d 1247, 1250 (7th Cir. 1990). The right to expressive association has been defined by the Supreme Court as "a right to associate for the purpose of engaging in those activities protected by the First Amendment. . . ." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *see also Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). Thus, the constitutional guaranty of expressive association is a protection of the right of individuals to join together or associate *for the purpose of* expressing ideas. This right is not implicated when two persons simply hold common beliefs or even when those different persons express those common beliefs—they must join together "for the purpose of" expressing those shared views.

Churchill's allegations fall well short of this mark. In ¶¶24 and 25 of her Third Amended Complaint, Churchill alleges that she "shared many of Dr. Koch's reviews respecting nurse staffing" and that the Defendants "perceived that Plaintiffs Koch and Churchill were associated in their opposition to cross-training." Such allegations do not create an expressive association claim. Nowhere is it alleged that Koch and Churchill joined "for the purpose of" expressing those shared views. Count V alleges only that the views were jointly held. Moreover, Count V suggests that Koch and Churchill actually associated for more personal reasons—¶24 states that in 1986 Churchill became

"both a professional supporter and personal friend of Dr. Koch's." Thus, aside from failing to allege (as it must to survive) that Churchill and Koch associated for the purpose of expressing their shared views, Count V actually alleges that they associated for more personal reasons.

The next question is what remains of Count V after Koch's claims are dismissed for lack of a case or controversy and Churchill's expressive association claim is dismissed for failure to state a proper claim? The answer is nothing. Although Count V might be read to allege additional free speech violation on behalf of Churchill, Plaintiffs' counsel noted in his memorandum that Count V was not intended to allege such claims because they are already contained in Counts I and III. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and/or Strike Count V of Second Amended Complaint, at p. 12. Indeed, even if counsel had not conceded as much, any remaining Count V allegations setting forth free speech claims by Churchill would be duplicative of Counts I and III and would be properly stricken. Therefore, Count V is properly dismissed for lack of a case or controversy and for failure to state a proper claim for relief.

II. *Defendants' Motion for Summary Judgment as to Counts I and III*

On October 9, 1990, the Defendants also moved for summary judgment on Counts I and III. In Count I, Churchill alleges that the individual Defendants violated her First Amendment right to free speech by terminating her in retaliation for her exercising that right. Count III alleges that MDH is also responsible for this First Amendment violation because the individual Defendants acted pursuant to an official hospital policy. This Court previously considered this same issue in its February 16, 1990 order.

In that order, this Court denied the Defendants' Motion for Summary Judgment, citing to disputes of fact. Specifically, this Court believed that disputes existed regarding what Churchill actually said in the kitchen area of the OB department and whether such speech was actually the motivating factor in Churchill's termination.

First was the issue of what Churchill said to Melanie Perkins-Graham in the kitchen area of the OB department on January 16, 1987. According to Churchill, all she said to Perkins-Graham at that time was that the cross-training policy and inadequate nurse staffing at MDH were having an adverse effect on patient care. (Churchill deposition, pp. 342-44). According to Perkins-Graham, the conversation was somewhat more specific. Perkins-Graham recounted that Churchill discussed her (Churchill's) relationship with Cindy Waters and how they did not get along and were unlikely to get along in the future. (Perkins-Graham deposition 9/15/87, pp. 74-76). Further, Perkins-Graham recalled that Churchill had said that Cathy Davis was going to ruin the hospital. (*Id.* at 78). Mary Lou Ballew, who overheard portions of the conversation and reported it to Churchill's supervisors, had yet a slightly different account. She recalled that Churchill criticized the OB department in general and had told Perkins-Graham that the department was not well-managed. (Mary Lou Ballew deposition 8/27/87, p. 107). Ballew felt that Churchill's comments were intended to dampen the enthusiasm of Perkins-Graham to participate in cross-training or to join the OB nursing staff. (*Id.* at 94-5, 98). Based on these factual differences and the dispute as to what actually precipitated Churchill's termination, this Court declined to grant summary judgment in the February 16, 1990 order.

On reconsideration via the present pending summary judgment motions, this Court now finds that no dispute

of *material* fact exists and that summary judgment is appropriately entered in favor of the Defendants. Even assuming that Churchill's statements to Perkins-Graham were the reason for her discharge, those statements (regardless of the version) were, as a matter of law, not protected speech, and therefore any termination in response to them does not violate Churchill's First Amendment rights. Moreover, even if Churchill's speech were protected, the balancing approach of *Pickering v. Board of Education*, 391 U.S. 563 (1968) favor upholding the Defendants' actions any denying Churchill's claims.

A. *Protected Speech*

No matter what alleged speech content is analyzed (that allegedly stated by Churchill in the kitchen area of the OB department or that reported to the Defendants by Ballew and Perkins-Graham), such speech is not protected. All of the versions of Churchill's statements have a common denominator—all are indicative of an attempt to simply air personal grievances rather than to speak out on an issue of public concern. As such, Churchill's statements are not entitled to First Amendment protection.

The Seventh Circuit recently summed up the interests which pervade First Amendment jurisprudence.

> The purpose of the free-speech clause and of its judge-made corollary the right of association is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions—scientific, political, or aesthetic—to an audience whom the speaker seeks to inform, edify, or entertain. Casual chit-chat between two persons or otherwise confined to a small social group is unrelated, or largely so, to that marketplace, and does not protect it. Such conversation is important to its

> participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment.

Swank v. Smart, 898 F.2d 1247, 1250-51 (7th Cir. 1990) (citations omitted). In accordance with these objectives, courts balance competing interests in situations such as that present here where a public employee was terminated in retaliation for something he or she said.

> An individual does not lose his First Amendment to freedom of speech because he is employed by the government. A balance, however, must be made between the rights of a government employee to comment on matters of public concern and the right of the government, as an employer, to promote the efficiency of its public services. Accordingly, in deciding whether the government has wrongfully deprived an employee of his right to freedom of speech, our initial inquiry is whether the employee was speaking on matters of public concern.

Gray v. Lacke, 885 F.2d 399, 410 (7th Cir. 1989) (citations omitted). The "public concern" test mentioned in *Gray* came from the Supreme Court's opinion in *Connick v. Myers*, 461 U.S. 138 (1983). In *Connick*, the Supreme Court stated that:

> When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 147. Whether particular speech is on a matter of "public concern" is a question of law for the Court.

Id. at 148, n.7; *Phares v. Gustafsson*, 856 F.2d 1003, 1007 (7th Cir. 1988).

As noted by the Supreme Court in *Connick*, "[w]hether an employee's speech addressed a matter of public concern must be determined by the content, form, and context of a given statement . . ." 461 U.S. at 147-48. *See also Breuer v. Hart*, 909 F.2d 1035, 1307-39 (7th Cir. 1990). The Seventh Circuit has opined that the content prong of the *Connick* test is the most important factor in determining whether certain speech is of public concern. *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984). The question is, given these standards, whether Churchill's conversation with Melanie Perkins-Graham on January 16, 1987 dealt with a matter of public concern.

Examining the content, form, and context, this Court is of the opinion that Churchill's speech was not on a matter of public concern. Although portions of the content of Churchill's statement to Perkins-Graham may have concerned issues that were of general interest to the public (such as the quality of care for patients in the OB department at MDH), the form and content of those statements indicate that they were not made to educate the public (or even Perkins-Graham for that matter) about problems in OB, but rather to air Churchill's personal feelings about her supervisors at MDH. Churchill did not espouse her opinions to a public audience or to authorities with power to make changes in policy. Rather, Churchill was repining to a co-worker in a coffee-room atmosphere. Such conversation is akin to "casual chit-chat between two persons" (*see Swank*, 898 F.2d at 1251) and is therefore not protected.

Moreover, the context of Churchill's statements further demonstrates that her objective was not to inform but

rather to gripe. The record in this case reveals a history of hostility between Churchill and her supervisors at MDH. Indeed, the text of Churchill's statements to Perkins-Graham about the impossibility of reconciliation with Waters because "too many things had happened" (Melanie Perkins-Graham deposition, p. 74) between them reinforces the evidence in the record concerning this long-standing feud. When put in the context of this repeated in-fighting, it is clear that Churchill's purpose or motive in making these statements to Perkins-Graham about problems in OB was to air her own personal grievances with Cindy Waters and other Defendants, and not to speak out on matters of public concern. Since Churchill "was speaking in her role as an employee about her personal feeling and not in her role as a citizen on a matter of public concern," her speech is not protected. *Yoggerst*, 739 F.2d at 296. When the purpose of an employee's expression of dissatisfaction with an employer are simply to air those feelings of dissatisfaction rather than to enlighten others on matters of public concern, the speech is not protected. *Id.*; *Linhart*, 771 F.2d at 1010; *Gray*, 885 F.2d at 411.

B. *Pickering Balance*

Generally, if a court determines that speech which prompted the discharged of a government employee is not of public concern, the inquiry ends and the court may find in favor of the employer. *See Breuer*, 909 F.2d at 1037. The balancing approach of *Pickering v. Board of Education*, 391 U.S. 563, is employed where the speech is first found to be of public concern—if the balancing of interests favors the employer, the termination may stand even though the speech was of public concern and therefore protected.

In *Breuer*, the Seventh Circuit summarized the balancing approach of *Pickering*.

> Under *Pickering*, the public employer's burden in attempting to justify the discharge of an employee for activities and statements involving matters of public concerns depends on various factors, which have been summarized by this Court:
>
> > (1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the [employee's] proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence.
>
> The court in *Connick* placed special emphasis on the fourth point: "When close working relationship are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."

909 F.2d at 1039-40 (citations omitted). Applying the factors noted in *Breuer*, it is clear that the balancing favors the Defendants. Factors (1) and (4) deal with the need to foster healthy working relationships between an employee and her supervisors and co-workers. In this Court's opinion the type of criticism which Churchill voiced to Perkins-Graham about her superiors was inherently disruptive to these interests and justified termination. Thus, even if Churchill's remarks to Perkins-Graham were protected speech on matters of public concern, the Defendants would be entitled to summary judgment under the *Pickering* balance.

III. *Count III*

Given the Court's ruling on Count I against the individual Defendants, Churchill's free speech claim against the hospital in Count III also fails. Count III alleges that the individual Defendants' actions in violating Churchill's First Amendment rights were done pursuant to an official policy at MDH, thereby making the hospital liable as well. Since this Court has found that no First Amendment violation occurred, there can be no violation pursuant to an official policy and MDH is entitled to judgment in its favor on Count III.

IV. *Counterclaim*

Since judgment is entered in favor of the Defendants as to all of the Plaintiff's claims, the Defendants' counterclaim against Koch for indemnity is moot.

CONCLUSION

For the reasons set forth above, this Court hereby GRANTS the Defendants' Motion to Dismiss Count V of the Third Amended Complaint. Further, this Court hereby GRANTS the Defendants' Motion for Summary Judgment as to Counts I and III of the Third Amended Complaint. Since this Court already granted summary judgment on Counts II and IV of the Complaint in its order of February 16, 1990, the Plaintiff's entire Complaint fails. Accordingly, judgment is hereby entered in favor of the Defendants and against the Plaintiffs.

ENTERED this 17th day of May, 1991.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

[DATED FEBRUARY 16, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CHERYL R. CHURCHILL, Plaintiff,	)	
v.	)	Case No. 87-1117
CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation, Defendants.	)	

ORDER

Plaintiff Cheryl Churchill has sued the Defendants pursuant to 42 U.S.C. § 1983 and Illinois law, alleging that termination of her employment as a nurse at McDonough District Hospital violated her First and Fourteenth Amendment rights, as well as breaching her employment contract. Specifically, in Count I, Plaintiff charges the individual Defendants with violation of her First Amendment rights. Count II charges the individual Defendants with violation of her Fourteenth Amendment rights to due process. Count III alleges that the hospital violated her First Amendment rights. Count IV alleges a common law breach of contract against the hospital.

Argument was heard on Defendants' Joint Motion for Summary Judgment on December 20, 1989. For the reasons stated below, the Motion for Summary Judgment is granted as to the Fourteenth Amendment claims and the

state law contact claims. The Motion is denied as to the First Amendment claim because of the existence of disputed issues of material fact.

FACTS

Cheryl Churchill was hired as a part-time nurse in Obstetrics by McDonough District Hospital (hereinafter "MDH") on October 25, 1982. On September 16, 1985 she began work as a full-time nurse in Obstetrics. On January 27, 1987 she was discharged by the hospital.

In April of 1986 Defendant Kathy Davis was hired by MDH as Vice-President of Nursing. Soon after her appointment, Davis made a number of changes in nursing practices, including the implementation of what is known as "cross-training." Cross-training involved pulling full-time nurses from general medical areas of the hospital and training them in more specialized nursing areas, such as obstetrics, so that the cross-trainees could provide flexible staffing as needed. The institution of this new policy was rather controversial, triggering a certain amount of controversy and discussion among medical and nursing staff at the hospital.

Among those opposing cross-training was the Plaintiff, while the individual Defendants all supported it. According to Churchill, she participated in a number of conversations about cross-training with other staff of the hospital.

On August 21, 1986 a medical emergency ("code pink") developed in the Obstetrics Department. The doctor on duty was Thomas Koch, M.D., the clinical head of the Obstetrics Department. A probationary employee, Mary Lou Ballew, was ordered by Dr. Koch to sound the alert for the "code pink." She did not know what to do and failed

to alert all the necessary medical personnel. Koch directed Churchill to prepare the delivery room for the impending emergency Caesarean Section and then himself secured the "code pink" alert.

During the surgical procedure, Defendant Cynthia Waters arrived in the delivery room. She asked Churchill about one of Churchill's patients who had recently delivered and was in the recovery room. Churchill checked on the patient and returned to the delivery room. Once again, Waters asked her about her patient. In response, Churchill said, "You don't have to tell me how to do my job." At that point, Dr. Koch reprimanded Waters, informing her that she was out of line in interfering with his orders to Churchill. Nonetheless, Churchill left the delivery room. After the operation, Dr. Koch again approached Waters to discuss her conduct. Waters, however, would not discuss the matter with Koch. Instead, she contacted Defendant Stephen Hopper, the President and CEO of MDH.

Subsequently, Hopper held a conversation with Koch and Waters, as well as another nurse, Marsha Clausen. Dr. Koch not only complained about Water's behavior, but expanded the conversation to include general complaints about the new nursing policies implemented by Davis and Waters.

Kathy Davis, who had been unavailable for that meeting, was contacted by Hopper and Waters later. Hopper, Davis, and Waters met on August 22 and August 25, 1986, and decided to issue a written warning to Churchill for insubordination based on her response to Waters in the delivery room. The written warning was presented to Churchill on a special form on August 25. The warning read as follows:

> REASON FOR WARNING: (1) Insubordination—when had to be asked twice to leave the delivery room, you responded to me [Waters] in a very hostile manner, "I don't need you to tell me how to do my work." (2) General negative attitude and lack of support toward nursing administration in the OB Department.
>
> WARNING GIVEN: Insubordination and/or lack of cooperation will not be tolerated in the future as it is very detrimental to the operations of the OB Department. Any future occurrence of this behavior will be subject to further disciplinary action which may include assignment to another nursing area or discharge.

In Churchill's deposition she acknowledged that, although she could have submitted a written response, she chose not to do so saying that she did not wish "to make mountains out of molehills." She also did not file a grievance protesting this warning.

On January 5, 1987 Churchill received her annual evaluation from Waters. The evaluation showed standard or strong performances in every area of the evaluation and reflected no areas of weakness. At the end of the evaluation, Waters wrote:

> Cheryl exhibits negative behavior towards me and my leadership—through her actions and body language, i.e. no answer, one word abrupt answers followed by turning and leaving, blank facial expressions, or disapproving facial expressions. This promotes an unpleasant atmosphere and hinders constructive communication and cooperation.

In the conversation between Churchill and Waters which accompanied the evaluation, Waters did not mention the handwritten comments at the end of the evaluation, and Churchill made no response either orally or in writing nor did she file a grievance.

On January 16, 1987 Cheryl Churchill began work on the 3:00 to 11:00 p.m. shift. The nurse in charge was Jean Welty. Other nurses working the same shift included Mary Lou Ballew and Melanie Perkins-Graham. Following departmental custom, Churchill and Perkins-Graham were eating their dinner in a kitchen area situated behind the main nurse's station in Obstetrics. Ballew and Welty were at the main desk. Dr. Koch walked into the department and went into the kitchen area where Churchill and Perkins-Graham were eating. Welty remained at the front desk while Ballew (the nurse present in the delivery room during the previously discussed incident involving Churchill, Koch and Waters) heard parts of the subsequent conversation in the kitchen; however, she was not at the desk or in the kitchen area for the entire course of the conversations since she was answering patient lights and performing other nursing duties.

Perkins-Graham told Koch that she was in the department for cross-training and was thinking about transferring to Obstetrics permanently. The subsequent conversation involved general criticisms and comments about the cross-training policy. Welty overheard Koch express his general views about cross-training and his reasons for disliking that policy. She also heard Churchill agree with Koch and say that Kathy Davis' policy was going to "ruin the hospital," and that some aspects of the cross-training program might violate certain state regulations. Welty also heard Perkins-Graham contribute her views to the conversation, and indicate that, while she was interested in transferring to the OB Department, she was reluctant because she had heard so many bad things about Cindy Waters. Welty heard Churchill encourage her to transfer, saying that Cindy Waters had a hard job but good intentions and that she was sometimes moody.

Ballew overheard only segments of this conversation. Apparently, she construed those portion she heard as negative and intended to dampen the enthusiasm of the cross-trainee, Perkins-Graham. Because of this, Ballew reported the conversation tc Waters, who went to Hopper on January 21 and advised him of the conversation. Hopper, who wanted to include Kathy Davis, held a meeting the next day at which Davis, Waters, and Hopper decided to talk to Perkins-Graham. On January 23, Perkins-Graham was summoned to Davis' office. When she arrived, accompanied by her supervisor, she agreed that Churchill had said unkind and inappropriate negative things about Cindy Waters and had said that things in general were not good in OB as a result of hospital administration policies. She repeated Churchill's comment about Kathy Davis "ruining the hospital" but admitted that she could not remember the conversation very specifically.

On January 26, 1987, Waters, Davis, Hopper, and Bernice Magin (Personnel Director of MDH) held a meeting at which they decided to discharge Churchill. The next day when Churchill arrived at work, Waters summoned her to Davis' office. There, Churchill was advised by Waters that, because she had continued to undermine the department and the hospital administration, Waters had no choice but to fire her. Bernice Magin explained how Churchill's benefit package would work following her discharge, discussed her final paycheck, and later explained to her the grievance procedure at the hospital.

Pursuant to the hospital's grievance procedure, Hopper reviewed the grievance Churchill filed. Churchill did not know and was not told of Hopper's involvement in the decision to fire her. Hopper decided that there had been three warnings beginning with the written warning following the delivery room incident. The second warning, he

concluded, was the written criticism at the end of the Churchill's evaluation. He concluded that Churchill's conversation on January 16 was a third offense within 12 months and therefore upheld the discharge.

At his deposition, Hopper testified that he found Churchill's comments about Davis and Waters objectionable not only because of their negative, insubordinate content, but also because she was voicing her concerns during working hours to the wrong forum. He viewed Churchill's conflict with Waters as a personal dispute which interfered both with department operations and with the hospital's cross-training policy.

At the time Churchill was first hired by MDH on a part-time basis, she was given a copy of the hospital's written statement of its employee relations guidelines, entitled Statement of Wages, Hours, and Employee Relations Practices-Human Resources Practices (hereinafter "handbook"). A number of provisions in the handbook are very important to this case.

First, on page 5, the handbook states its purpose including in relevant part the following:

> The intent of these Human Resources Policies is to set forth all those basic matters regarding conditions of employment, rates of pay and hours of work to be observed by both the hospital and by all those employees covered by this Statement of Purpose.
>
> The conditions and procedures established in these policies are intended to spell out the mutual employment relationship between the hospital and its employees, so as to assure:
>
> 1. Complete cooperation of all hospital personnel, and
>
> 2. Fair adjustment of any differences that may arise in the employee-employer relationship.

> Scheduling and assigning of work, the direction of the hospital staff, its expansion and reduction, the control and location of operations including when, where, and by whom work shall be performed, and the determination of the means, methods, processes, schedules and standards of performance are the responsibility of the hospital.
>
> Enactment of these responsibilities by the hospital will be completed within the specific and expressed outlines as provided in these policies . . .
>
> The mutual interest of all employees and the hospital calls for the continued successful promotion and development of unexcelled patient care. The basic purpose of this statement is to contribute toward such goals through the observance by both the hospital and each employee of the provisions and intent of these Human Resources Practices.

The next page of the handbook is a letter from Hopper in which he emphasized that, although the hospital's primary aim was to provide outstanding medical care, the main factor in successfully achieving that aim was the hospital's employee:

> An employee must not only do a good job, but should enjoy doing that job. Satisfied employees are men and women who TAKE PRIDE in their work, who feel their jobs are WORTHWHILE, and who know their efforts and their work is RECOGNIZED. In recognition of these human values, we have established the following Human Resources objectives:
>
> . . .
>
> 9. To respect the individual employee's rights and assure employees of their right to freely discuss with supervision any matter concerning their own or the hospital's welfare. . .
>
> . . .
>
> To implement these aims in a spirit of friendliness and cooperation, we have established Human Resources Policies which are put into effect through systems and procedures. We believe that neither the hospital nor its employees can succeed unless these objectives, these policies, and these procedures, are known, understood, and observed by all.

[emphasis in original]

Article I of the handbook is entitled General Information. In Section 1.05, it provides:

> Insofar as practical, exceptions to these Practices will be avoided. These Human Resources Practices will be periodically reviewed and adjustments will be made based on practices of other employee units in the area, as well as other economic considerations. Should an exception to these Human Resources Practices be in order, the request in writing, for approval for such an exception should be made; and the approval received from the President/CEO or his designate.

Section 1.06 provides:

> These Human Resources Practices are provided to insure that all personnel understand their respective roles and responsibilities, and that each employee covered by these Practices is afforded job security and means of redress, should a misunderstanding occur between the employee and his/her immediate supervisor.
>
> *The contents of this handbook are presented as a matter of information only and the language contained herein is not intended to constitute a contract between McDonough District Hospital (MDH) and you, the employee.*
>
> Except for the necessary rules and regulations regarding expected conduct and behavior, the plans, policies and procedures described herein are not to be considered conditions of employment. MDH retains the rights to change, revoke, suspend, modify or ter-

> minate any or all such plans, policies, and procedures in all or in part at any time with or without notice.

[emphasis in original].

Article II of the handbook is called Employment Status. In § 2.01, entitled "ESP" (Employment Security Policy), the handbook states that MDH "offers each employee 'Job Security' based on your productivity, the quality of your work and your loyalty to the hospital." Article II goes on to define four different types of employee and states that all new or rehired employees are characterized as probationary during the first ninety calendar days of continuous employment. Section 2.04 states that "During the Probationary Period, termination of employment may be made without prejudice to either the employee or the hospital. Thus, no notice of termination by either the Hospital or the employee during the Probationary Period will be necessary."

Section 2.06 provides that an employee's employment can be terminated for six reasons: discharge for cause, voluntary resignation, retirement, layoff, failure to report to work following a layoff, unreported or unverifiable absences for three days or more. Discharge for cause is not defined in Section 2.06.

Article IX of the handbook, entitled Resolving Differences, states that the procedure in Article IX provides "the sole and exclusive remedy for any employee who believes the hospital has violated these Human Resources Practices in any way." Section 9.02 reassures that grievances may be expressed without fear of prejudice or reprisal.

The grievance procedure set out in Section 9.03 consists of three steps. Step 1 is departmental review. It requires that the employee present in writing to his or her departmental director the claim. The director is to consider the problem and attempt to reach a settlement within 7 calendar days.

If step 1 does not resolve the problem, the complaint proceeds to step 2 which is administrative review. This step requires that the employee present the grievance in writing to the Vice-President of Human Resources who is to hold a conference with the employee, the Vice-President In Charge and the Vice-President/Human Resources. The problem is to be considered by the Vice-President In Charge and settlement is to be attempted.

If there is no resolution within 7 days, the employee is to proceed to step 3 at which time the grievance is presented to the hospital President/CEO in writing. The President is to conduct a thorough investigation and deliver a written decision with 10 days. Article IX provides that the President/CEO's decision shall be final and binding for all purposes on the employee and the hospital.

Article IX also provides that if the subject of the employee's complaint is the employee's department director, the employee may proceed directly to step 2. In the case before the Court, the employee was permitted to proceed directly to step 3 since her complaint not only concerned her department director but also the Vice-President In Charge.

Article X of the handbook, entitled Discipline, sets forth general guidelines for discipline of employees. The important sections are set forth below. In all the below guidelines, emphasis has been added to call attention to precatory and mandatory language.

> 10.02 DISCIPLINE AND CODE OF CONDUCT
>
> Any time a group of people work closely together in a business situation, there must be some guidelines

and rules to assure a safe, efficient business operation; to assure compliance with the public law; and to protect the well-being and rights of patients and of all employees. Many of the MDH rules will be readily understood and observed by individuals who qualify for MDH employment, since they are the same rules which guide behavior in relationships with other people anywhere in any social or business relationship. Other work rules and practices are more applicable to people working together in the health care environment of McDonough District Hospital.

Discipline, whether a warning, suspension or discharge is given for the purpose of preventing a recurrence of behavior which is unacceptable. It is in no sense designed to humiliate or retaliate. *In every case*, the employee *shall be given* ample opportunity to state his case and discuss his point of view.

At the first indication that any MDH employee is becoming lax in following our practices and work rules, but where formal disciplinary action is not indicated, the employee's Department Director/Supervisor *will discuss* the situation with him/her to insure a clear understanding of what is expected. Should the employee fail to correct the situation, the Department Director/Supervisor *may* then decided to take formal disciplinary action.

10.02 DISCIPLINE—GENERAL GUIDELINES

a. Discipline *may be* initiated for various reasons including, but not limited to, violations of work rules, insubordination or poor job performance. The severity of the action depends on the nature of the offense, and the employee's record, and *may range* from verbal counseling to immediate dismissal.

b. The *normal* progressive discipline procedure consists of:

1. Verbal counseling
2. First written warning
3. Final written warning, which may include suspension
4. Discharge

Any or all of these steps *may be* utilized, depending upon individual circumstances and the nature of the infraction. Moreover, exceptions or deviations from the normal procedure *may occur* whenever Administration deems appropriate.

c. Progressive discipline must be timely and should follow, as closely as possible, the incident requiring the disciplinary action.

10.03 PROGRESSIVE DISCIPLINE

a. With the exception of offenses requiring more stringent action, employees will *normally* be counseled once verbally before receiving a written warning.

b. In the event of another performance problem or a violation of any hospital policy, a written warning will *ordinarily* be issued.

1. The warning *should* be signed and dated by the employee . . .

2. The warning *should* inform the employee of the possible consequences, including final written warning, suspension and/or discharge, should additional violations or performance problems occur . . .

c. If a third offense occurs within twelve (12) months of the previous written warning, a final warning *should* be issued.

d. If the employee violates a hospital policy or fails to improve performance, termination *may* result.

> McDonough District Hospital *reserves the right to deviate* from this policy when circumstances warrant such a deviation.
>
> Formal disciplinary action *shall be applied* by management *according to the circumstances* and the offense involved in each individual case.

The next section lists several examples (explicitly *not* all-inclusive) of offenses for which a written warning will "ordinarily" be issued. One of those offenses is the failure to carry out a supervisor's specific instructions. None of the other examples are relevant to this case.

The next section sets out offenses which are of such a nature that they *may* result in suspension without pay. In addition, the handbook states that repetition of one of these offenses will *usually* result in discharge. The example includes willful refusal to obey a supervisor. None of the other examples are pertinent.

The final section in Article X lists examples of action and behavior that normally warrant discharge without prior warning. None of the examples are relevant to this case.

Finally, in Article XII, Section 12.01, entitled Reservation of Rights, the handbook states:

> It is impracticable, and probably impossible, to attempt to set forth in these Human Resources Practices answers to all the possible employment problems which may arise. Further, it is essential to effective operation of the Hospital that Hospital management retain the responsibility and right to direct and manage the Hospital and the staff in the manner the Hospital considers best designed to carry out the Hospital's health care delivery obligations. Therefore, *except to the specific extent that a subject with respect to the employment relationship is covered in this Statement*

> *of Human Resources Practices, the Hospital expressly retains the right to take any action which does not conflict* with the provisions of this Statement of Human Resources Practices or applicable law.

[emphasis added].

FOURTEENTH AMENDMENT DUE PROCESS CLAIM

In their Motion for Summary Judgment, the Defendants argue first that Churchill had no property interest in her employment under Illinois law. The Defendants correctly point out that under Illinois law, the Plaintiff must show that the handbook created a legally enforceable expectation of continued employment pursuant to *Duldulao v. St. Mary of Nazareth Hospital*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987).

In *Duldulao*, the Illinois Supreme Court ruled that a handbook creates enforceable contract rights where the traditional requirements for contract formation are present. First, the language of the policy statement must contain a promise clear enough that an employee could reasonably believe that an offer had been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, an employee must accept the offer by commencing or continuing to work after learning of the policy's statement. *Id.* 505 N.E.2d at 316, 106 Ill.Dec. at 10.

In *Duldulao*, the court found that the employee handbook had created enforceable rights because there were very clear promises made. For example, the handbook stated it was designed to "clarify your rights" and that after probation an employee would become a permanent employee and "termination . . . cannot occur without

proper notice and investigation." In addition, it stated that "permanent employees are never dismissed without prior written admonitions and/or an investigation" and that "three warning notices . . . are required before an employee is dismissed." 505 N.E.2d at 316, 106 Ill.Dec. at 10. In addition, the handbook sets out a list of examples which would justify immediate dismissal without notice and another list of offenses which were specifically not subject to immediate dismissal. The court held that an employee reading the handbook would reasonably believe that, except in the case of the specific listed offenses, he or she would not be discharged without prior written warnings. *Id.* 505 N.E.2d 319, 106 Ill.Dec. at 13.

The court also considered it significant that the handbook contained no disclaimer to negate the promises made. To the contrary, the introduction to the handbook stated that the policies in the handbook "are designed to clarify your rights and duties as employees." *Id.*

The legal impact of a disclaimer was further examined in the case of *Yocum v. Show Biz Pizza Time, Inc.*, No. 88-3128, (N.D.Ill. Feb 21, 1989) (1989 WL 15961). In that case, the employee handbook outlined the guidelines and policies of employment, provided specific employee rules, and spelled out which violations would result in immediate dismissal and which would result in a lesser form of remedial action. In addition, the handbook contained a conspicuous disclaimer reading "Our relationship is, and always will be, one of voluntary employment 'at will.' " The court first refused to find that the handbook promised that employees could only be fired for cause, stating that "a negative inference . . . certainly cannot provide the basis for the type of clear promise that *Duldulao* contemplated." *Id.* at 4. In addition, the court held that the clear language of the disclaimer meant that it would be unreasonable for

a plaintiff to believe that he was being offered a job in which he could be fired only for cause. *Id.*

In *Doe v. First National Bank of Chicago*, 865 F.2d 864 (7th Cir. 1989), the Seventh Circuit also considered a disclaimer contained in an employee handbook. The disclaimer stated in full "Neither this policy nor any provision of this policy manual is intended to set forth the terms and conditions of an individual's employment or termination of employment, to constitute a contract of employment, or to confer any additional employment rights. Employment can be terminated at any time and for any reason by either the employee or FCC" *Id.* at 873.

In addition to the handbook, the employees in *Doe* received a memorandum which described major and minor offenses and which provided that employees could be disciplined or discharged for the listed misconduct but which never promised that specific disciplinary procedures would be used.

The Seventh Circuit held that the employee manual in combination with the memorandum, did not create enforceable rights. Specifically, the Court held that the manual could not as a matter of law constitute a contract since

> We fail to see how a document which clearly disclaims in unambiguous language any purpose to bind the parties can constitute a promise clear enough that an employee would reasonably believe that an offer has been made. [citation omitted].

Id. Thus, the basis for the Seventh Circuit's finding was a failure to find an intent to be bound which, after all, is what an offer of contract is.

A comparison of the handbooks in *Duldulao* and *Doe* with MDH's handbook leads the Court to conclude that

MDH did not make any promises sufficiently clear that it would have been reasonable for Churchill to believe it was an offer. Specifically:

In *Duldulao*, there was no disclaimer, while in *Doe* as in this case, there is one. Plaintiff argues that the disclaimer here is a legal conclusion, i.e. since under Illinois law such legally conclusory language is insufficient to form the existence of a contract, the opposite must also be true; if the disclaimer does not assert that employment is *at-will*, then the statement that no contract is intended cannot be construed to bar contract formation.

The Court disagrees for several reasons. First, the disclaimer expressly disavows any intent to be bound, which was the factor on which the Seventh Circuit relied in *Doe*. Second, the disclaimer doesn't *only* say that there is no contract intended, as Plaintiff claims. Rather, it says that the contents are "presented as a matter of information *only*," which belies any intent to be bound. Third, in the paragraph immediately after the disclaimer, the handbook states that its contents are not to be considered conditions of employment, as did the disclaimer in *Doe*.

Most importantly, however, Plaintiff assumes that this disclaimer is inconsistent with the rest of the policy, and that, in its absence, Plaintiff's property right would be clear. This assumption is incorrect.

In *Duldulao*, the letter from the hospital president to employees stated that the policies were designed to clarify their *rights*. In *Doe* (although this factor was not discussed), the policy manual spoke in terms of "guidelines." In this case, the contents of the handbook are referred to alternatively as Policies, Practices and Guidelines.

In *Duldulao*, the procedures for discipline were emphatically mandatory: "never dismissed," "required," "cannot

occur." In *Doe*, the Court noted that the precatory language contained no promise that specific procedures would be used. In this case, Article X (Discipline) is written entirely in language which is obviously intended to suggest guidelines and nothing more ("may be," "normal procedures," "ordinarily," "should"). It is accompanied by explicit reservations: exceptions are allowed under § 10.02(b) whenever administration deems appropriate; MDH reserved the right to deviate from the progressive discipline policy when circumstances warrant under § 10.03; in Article XII, MDH reserved its right to take any action which does not conflict with a specific portion of the handbook.

There are some aspects of the handbook which might, if read in isolation, seem to indicate an offer. For example, Plaintiff claims that MDH explicitly *offered* job security, a promise missing in both *Doe* and *Duldulao*. She relies on § 2.01 which does indeed use the word "offer." However, that single word cannot be read in isolation. Nor can an "offer of job security" be any more than a general statement; it is certainly *not* a clear promise.

As a whole the handbook does not constitute a promise clear enough for an employee to reasonably believe that an offer was made. *See also*, *Harrell v. Montgomery Ward & Co.*, 189 Ill.App.3d 516, 545 N.E.2d 373, 136 Ill.Dec. 849 (1st Dist. 1989) (holding that the existence of a promise is a question of law to be determined by the court); *Tolbert v. St. Francis Extended Care Center*, 189 Ill.App. 3d 503, 545 N.E.2d 384, 136 Ill.Dec. 860 (1st Dist. 1989) (holding that an employer's promise not to discharge except for just cause is not a sufficient promise to constitute an offer); *Koch v. Illinois Power Co.*, 175 Ill.App.3d 248, 529 N.E.2d 281, 124 Ill.Dec. 461 (3rd Dist. 1988), app. denied 535 N.E.2d 915, 129 Ill.Dec. 150 (1989) (general statements and guidelines for discipline could not reasonably

be construed as an offer); *Mursch v. Van Doren Co.*, 851 F.2d 990 (7th Cir. 1988) (repeated use of non-mandatory language evinces a clear intent not to create a binding agreement).

For this reason, Churchill had no enforceable property interest granted to her by the handbook. Absent a property interest in continued employment, Plaintiff cannot proceed on her due process claim and summary judgment would be proper on this basis alone.

Even if, however, this Court had found that Churchill had a property interest in continued employment, several recent Seventh Circuit cases would mandate dismissal of her due process claim.

In *Easter House v. Felder*, 879 F.2d 1458 (7th Cir. 1989), the court discussed the Supreme Court's recent pronouncements in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), in which the Supreme Court held that a random and unauthorized intentional deprivation of property by a state employee does not constitute a violation of procedural due process if a meaningful post-deprivation remedy is available. The underlying principle of *Parratt* was to prevent turning the Fourteenth Amendment into "a font of tort law to be superimposed into whatever systems may already be administered by the state." *Id.* at 544.

In *Easter House*, the plaintiff contended that *Parratt* did not apply where the property deprivation had resulted from actions of high level state and local officials engaged in a conspiracy to violate a citizen's constitutional rights. The Seventh Circuit first found that a conspiracy could be a random act, if, from the point of view of the state, the state could not have anticipated or controlled the conduct in advance. 879 F.2d at 1469.

Next, the Seventh Circuit considered whether actions of high level state employees could ever be characterized as random or unauthorized. The Seventh Circuit held that the relevant inquiry was whether those employees' actions were random and unauthorized from the *state's perspective*, regardless of the level of the employee in the governmental hierarchy. In other words, a random act by a high ranking state employee who has disregarded the state's formal policy or established procedure does not necessarily translate into a deprivation of due process. The process provided by the state *as a whole* must be examined. Thus, there is a distinction between a claim which challenges the adequacy of the state's policy or procedure itself and a claim that a high ranking state official disregarded otherwise adequate process.

Only when the state has delegated the power to make policy and procedure to a specific policymaker, and that policymaker establishes procedure on an informal case by case basis without any formal policy or procedural guidelines from the state, can that policymaker's random and unauthorized actions be attributed to the state itself. *Id.* at 1472.

After concluding that a high ranking official's conduct can be random and unauthorized, the Seventh Circuit proceeded to apply *Parratt* to determine whether the post-deprivation procedures available comport with due process. The Seventh Circuit noted a number of legal theories available under Illinois law which would provide relief to Easter House, concluding that adequate state remedies existed to correct any injuries which may have resulted from improper conduct. Under the principles of *Parratt*, that is sufficient enough to provide adequate due process. *See also, Thornton v. Barnes*, 890 F.2d 1380, 1389 (Moody J. 1989) (holding that state tort remedies are sufficient post-deprivation relief to satisfy due process).

Under the reasoning of *Easter House*, it becomes very important to examine the procedures of the state as a whole, as well as the underlying basis for the due process claim. The analysis is very different if the claim is that the state's procedures as a whole are constitutionally inadequate than it is if the argument is that a state official failed to follow otherwise constitutionally adequate procedures.

The Fourth, Fifth and Sixth Circuits have subsequently interpreted this aspect of *Parratt* as meaning that, if a state system by procedure and ordinary practice, does in fact provide a party with due process, there is no violation of the Fourteenth Amendment merely because of a random deprivation without the hearing required under state law. *See Holloway v. Walker*, 790 F.2d 1170 (5th Cir. 1986); *Fields v. Durham*, 856 F.2d 655 (4th Cir. 1988); *National Communications Sys. Inc. v. Michigan Public Service Comm'n.*, 789 F.2d 370 (6th Cir. 1986).

In the case before the Court, Churchill's due process claim is that the hospital's policy requires supervisors to provide notice and an opportunity to present their case and discuss their point of view. Thus, the claim is *not* that the state's procedures themselves are constitutionally inadequate but rather that Waters, Davis and Hopper failed to follow the established policy. Such a claim is not cognizable under § 1983 if there are adequate post-deprivation remedies, per *Easter House* and *Thornton*.

Plaintiff argues that because the hospital's policy provides Hopper with the authority to make a final and binding decision, there are no adequate remedies. This argument ignores the state law remedies which were found adequate in both *Easter House* and *Thornton*. Because Illinois law provides at least one remedy (breach of em-

ployment contract, *see Duldulao*) Churchill has adequate post-deprivation remedies to satisfy due process concern.

This conclusion is consistent with the policies which underlie *Parratt* and *Easter House*. Both of those cases stemmed, at least in part, from the Court's concerns that § 1983 not be allowed to become a font of tort law. Here, where the state does not provide a cause of action, allowing Plaintiff to proceed with her constitutional claim would be inconsistent with that concern.

Thus, the individual Defendants' Motion for Summary Judgment on the due process claim (Count II) is granted either because the Plaintiff has not established and cannot establish that an employment contract was created by the policy handbook, or because Illinois provides a meaningful post-deprivation remedy which satisfies due process.

BREACH OF CONTRACT

The *Duldulao* analysis is identical under the Plaintiff's state law claim for breach of employment contract as it was under her due process claim. Absent proof that the handbook contained clear premises which indicated an intent to bind the parties, no contract was created.

Thus, for the same reasons as stated above, Defendants' Motion for Summary Judgment relating to the state law claim for breach of employment contract (Count IV) is granted.

FIRST AMENDMENT

Because of the existence of material factual disputes, Defendants are not entitled to summary judgment on the

First Amendment claim. The Motion for Summary Judgment on Counts I and III is therefore denied.

This case is hereby set for a telephonic status conference with Magistrate Kauffman on March 12, 1990. The Court will initiate the call.

NOTES OF CHERYL R. CHURCHILL REGARDING MEETING WITH STEPHEN HOPPER ON FEBRUARY 6, 1987

I met with Mr. Hopper on Friday, Feb. 6, 1987 at 9:30 A.M. Mrs. Magin was also in attendance at the meeting.

After the initial polite conversation Mr. Hopper said that he had received my letter, and that he wanted to preface our meeting by stating that he wanted our discussion to be limited to the issues at hand, and he did not want us to "get off the track." He said he wanted to be told of the events that that were pertinent to my complaint. As far as I can recall, neither he or Mrs. Magin ever mentioned the words firing, termination, or discharge. Mr. Hopper opened the discussion by stating that he was interested in hearing what I had to say about my *first* warning—the one having to do with a C-section. (There was only *one* warning!) He also said he wanted to hear my comments regarding the comments Cindy had written on my last evaluation. (I got the impression that he was trying to classify my last evaluation as a second warning from Cindy. I definitely did *not* receive a warning from Cindy at that time, *nor at any other time*, except for the *one* written warning that I got on August 24th). Mr. Hopper also said he wanted to know about the incident regarding my talking about Cindy and Mrs. Davis, with negative overtones one evening while working in OB with a cross-trainee working the same shift with me.

Before discussing the specifics that Mr. Hopper outlined, I voiced some of my concerns regarding the cross-trainee program and its faults and shortcomings. I told him that I thought there were serious problems in OB—one of them was assigning people, still in orientation, to fill staffing

slots when necessary. I advised him that the use of inexperienced staff indicated to me that there was no apparent regard to the *quality* of nursing care that was being provided—that they were assigning numbers, *not* quality. Mr. Hopper just looked at me and said he didn't want to get into that, and asked me again about the events of the August 21st C-section. He said he wanted to know if it was my duty or my assignment to be in the delivery room during the emergency C-section. I explained to him that emergencies are not planned they just happen and when a life and death emergency presents itself everyone in the dept. is responsible for doing whatever is necessary to ensure the patient and her unborn child, that we will do all within our power to deal with the situation in a manner that will, hopefully, bring about a happy ending to the crisis. I explained to him that when I became aware of the situation and also aware that things were not being adequately or correctly done in order to bring about the fastest and most efficient care to the patient, I took over and, more or less, directed others to do things that needed to be done while I took care of doing the things that needed to be done first, and were of utmost importance. I told Mr. Hopper that I felt my performance was that of a highly skilled professional and I was glad that I had been there to help. I also told him that I had not been asked to leave the room twice by Cindy—only once!

We talked about Cindy's comments on the evaluation that I received on Jan. 5th. When I talked of the evaluation I reminded him that the evaluation was very good—that there was no reason for me to be fired. I advised him that I had received nothing but good evaluations since I started working. I told him that I began working at MDH, in OB, nearly 4½ years ago and had never had an incident occur in which anyone ever questioned my

nursing judgement. He asked me if any one had *ever* said anything negative about my nursing care, or had anyone ever accused me of *not* being a *very good nurse*. I said, "No." He said "Well, that's not the issue then, so I think we'd better stick to the issues and not discuss things that are not at issue here."

I reminded him that I had not been given a written reason for my termination. He made no comment as he looked over his notes. After a moment he stood up, and said that he would review my grievance and that I would be notified, by mail, of his decision.

No. 92-1450

In The

Supreme Court of the United States

October Term, 1992

CYNTHIA WATERS, *et al.*,

Petitioners,

v.

CHERYL R. CHURCHILL, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions set forth by the Petitioners are not supported by the record or the opinion of the Court of Appeals. The following two questions are supported by both.

1. Does a public employer who terminates an employee on reports of speech critical of the employer which reports the employer concedes could have referred to protected speech on matters of public concern violate the First Amendment if the employer refuses to make a reasonable attempt to ensure that the speech was unprotected and the employee can make a substantial showing that it was protected?

2. In January, 1987, was a public employer entitled to qualified immunity for discharging an employee based on reports of speech critical of the employer which reports the employer concedes could have referred to protected speech on matters of public concern when the employer refuses to make a reasonable attempt to ensure that the speech was unprotected and the employee can make a substantial showing that it was protected?

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STATEMENT OF THE CASE

Respondent Cheryl Churchill sued petitoners Cynthia Waters, Kathleen Davis, Stephen Hopper, and McDonough District Hospital pursuant to 42 U.S.C. §1983 alleging she had been discharged in violation of the First Amendment.* The district court granted summary judgment to the Petitioners, and Churchill appealed. The United States Court of Appeals for the Seventh Circuit reversed and remanded to the district court for trial. The court held that genuine issues of material fact existed as to the content of Churchill's speech and whether the *Pickering (v. Board of Education,* 391 U.S. 563 (1968)) factors applied. The court held that if the content of the speech was as Churchill contended, it was protected as being on a matter of public concern.

A. The Cross-Training Policy

McDonough District Hospital (MDH) is located in Macomb, Illinois and is, under Illinois law, a municipal corporation.[1] MDH has several departments which deliver various specialized medical services. Among the departments is obstetrics (OB). Cynthia Waters was the nursing department head in OB, Kathleen Davis is and

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* The statement of the case is based on the record developed in the district court which was before the Court of Appeals. Sometimes Churchill makes specific reference to her appendix filed in the Court of Appeals by the designation "A" plus the page number.

[1] *Ill.Rev.Stat.* Ch. 23 §1264, et seq.

was the Hospital vice president for nursing, and Stephen Hopper is and was the president and CEO of MDH.

Respondent, Thomas Koch, M.D., has been the clinical head of OB[2] since 1980. He has the obligation to ensure appropriate delivery of medical care in OB and has always insisted on MDH maintaining nurse staffing levels which, at a minimum, comply with the requirements of the Illinois Department of Health.[3] Respondent Cheryl Churchill was a registered nurse in MDH OB from 1982 until her discharge in 1987.

In April, 1986, Petitioner Kathleen Davis became the vice president of MDH for nursing. She implemented a new nurse staffing policy called cross-training. Petitioner Cynthia Waters was the OB nurse department head responsible for implementing the policy in OB. Dr. Koch opposed cross-training and RN Churchill joined him in that opposition. Their opposition to cross-training focused on their perception that, as it was being implemented in OB, there was no systematic effort to train the non-OB nurses. Rather, nurses from less specialized

[2] The Obstetrics Department like the other departments in MDH had both a clinical head and an administrative head. The clinical head was a doctor who was ultimately responsible for the quality of medical care performed by the department. The administrative head was the doctor responsible for the credentialing of the doctors with staff privileges in the particular areas of medical speciality of MDH, such as obstetrics, surgery, etc. Doctors are not employees of MDH. Rather, they are granted staff privileges pursuant to the bylaws of the MDH medical staff and of MDH.

[3] 77 Ill. Admin. Code Ch. I §250.1830, sub. Ch. b(f) et seq.

departments[4] were sporadically sent to train in OB only by following the regular OB nurses through their rounds. Dr. Koch and Churchill believed that the regular OB nurses were diverted from giving appropriate attention to the patients by the obligation to "train" the cross-trainees thus creating a heightened malpractice risk. By the same token, Dr. Koch and Churchill felt the nurses' obligations to their patients precluded them from giving sufficient attention to the cross-trainees to afford them meaningful training.

Because Dr. Koch was outspoken in his insistence on appropriate nurse staffing levels and because Churchill agreed with Dr. Koch's objections, both were under scrutiny by the MDH administration beginning in the late summer of 1986. MDH President/CEO Hopper was maintaining a file in his desk of criticisms that were compiled about Dr. Koch by Waters and Davis. Waters was maintaining a similar file on Churchill.

B. The August 21, 1986 "Code Pink"

The Hospital administration's anxiety over Dr. Koch and Churchill erupted into a campaign to punish both of them beginning August 21, 1986. On that date, a "code pink" was ordered that required all available nursing and medical staff in MDH to report to the operating room in OB where Dr. Koch was performing an emergency

[4] Obstetrics nursing is generally regarded as a specialized nursing field.

caesarean section.[5] Dr. Koch directed Churchill to perform various particularized tasks. The "code pink" C-section was successfully concluded.

Waters did not arrive at work the morning of August 21 until after the "code pink" was underway. When she went into the operating room, she ordered Churchill out of the room to check on a patient. Churchill had just checked the patient prior to the beginning of the "code pink" procedure. Churchill obeyed Waters but told Waters she "didn't have to tell [Churchill] how to do her job." Dr. Koch was furious at Waters disrupting the procedure and directing nurse personnel from the room without his consent and contrary to his instructions. After the "code pink" procedure was concluded, Dr. Koch told Waters he wanted to talk to her.

Waters refused to talk to Dr. Koch alone because she knew he was upset. She called Hopper, who had told her he would help her anytime she needed help with regard to Dr. Koch and asked him if he would assist her. Hopper agreed to do that and the three of them met in a MDH conference room adjacent to CEO Hopper's office. In that meeting, Dr. Koch outlined his concerns respecting not just Waters' interference with his conduct of the "code pink" caesarean section that morning, but his position

[5] A "code pink" at MDH referred to the medical emergency when the life of a mother, her baby or both was in immediate danger. When a "code pink" is called, ali available medical personnel are required to report to the room where the emergency is occurring to render assistance as directed.

respecting the situation in OB generally. Hopper took notes of that meeting.[6]

C. The Unsuccessful Campaign To Deny Dr. Koch Reappointment to The Medical Staff

After the meeting involving Hopper, Waters and Dr. Koch, Hopper and Waters met the next day with Davis and with Dr. Jack McPherson, the medical administrative head of OB. As the administrative head of OB, Dr. McPherson was responsible for either recommending or not recommending Dr. Koch and the other physicians with OB privileges for reappointment to the medical staff for the oncoming year, 1987. Hopper and Waters did not advise McPherson and Davis of Dr. Koch's concerns as recorded by Hopper. Instead, they advised him that Dr.

[6] According to Hopper's notes, Dr. Koch made the following points: Dr. Koch felt that three other nurses besides Cheryl Churchill were picked on by Cindy Waters. He had seen no progress on items which had been discussed in a June meeting of the Obstetrics Department. A certain nurse was a hazard on the night shift. Dr. Koch didn't feel that it was appropriate to train three orientees at once. Nurses who weren't ready to work on their own should not be on staff at night. Dr. Koch wanted equal treatment for all people. He didn't think rotation in the nursery was satisfactory. Staff nurses were afraid to speak to Cindy Waters. Dr. Koch wanted to make people working in OB happier. He felt that some major clinical matters should come to his attention. He felt that Cindy Waters should give fair and consistent direction to the staff and that if Cheryl Churchill [was] in fact doing something wrong she, like anybody else, should be corrected. Hopper noted that Dr. Koch and Cindy Waters concluded the meeting by hugging each other. A. 128-129.

Koch was temperamental and out of control. They discussed taking the matter to the medical staff credentials committee which met in November, 1986, for the purpose of keeping Dr. Koch from being reappointed to the medical staff for 1987. Hopper, Waters and Davis also decided to issue Churchill a "written warning" for "insubordination" based on her comment "you don't have to tell me how to do my job."[7]

Hopper and Waters then met on August 25, 1986, with Dr. Roger Lefler, chief of the medical staff and ex-officio member of the medical staff credentials committee. Hopper and Waters brought to Lefler's attention their concerns about Dr. Koch's temper. Rather than advising Dr. Lefler of Dr. Koch's concerns as Hopper had recorded them on August 21, 1986 (n.6, *supra*), Waters resurrected a complaint she had against Dr. Koch dating to 1982, when Dr. Koch had reported on a medical progress chart that inadequate nurse staffing was the reason for the near fatal birth of a baby.[8] Hopper and Waters also told Lefler

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[7] A written warning was step two in a progressive discipline scheme consisting of first, a verbal counseling, second, a first written warning, third, a final written warning which [could] include suspension and last, discharge.

[8] On September 8, 1982, Dr. Koch had a labor patient in OB and MDH administration had moved nursing staff from OB to another department with the acquiescence of Waters, but over Dr. Koch's vigorous opposition. Dr. Koch feared that moving nursing staff from OB made the department less able to meet emergencies which developed. That fear had materialized when, because of another emergency, Dr. Koch's labor patient went unattended for 65 minutes during which the fetus was not getting sufficient oxygen. Dr. Koch was summoned and delivered the baby which was born dead. He was able to revive the baby but it suffered mild retardation. Dr. Koch noted the inadequate nurse coverage because of the other emergency in a medical progress note. Waters was angered that Dr. Koch made that notation and her anger manifested itself four years later in the August 25, 1986 meeting with Dr. Lefler. The baby's parents sued MDH and Dr. Koch. The Hospital paid a $200,00 settlement and Dr. Koch went to trial and was exonerated of malpractice by a jury.

that Dr. Koch cared only about "himself [and] Cheryl." Also on August 25, 1986, Waters and Davis delivered the written warning to Churchill for "insubordination" for her "you don't have to tell me how to do my job" statement.

The credentials committee of the medical staff met November 10, 1986, and admitted with full staff privileges all doctors who had applied except Dr. Koch. Dr. Koch's application was tabled on Dr. Lefler's motion made after representations by Hopper and McPherson. Hopper volunteered to check with MDH lawyers and determine what legal exposure anyone who recommended against Dr. Koch's reappointment might have.

The hospital medical staff credentials committee met again on December 8, 1986, at which time Hopper and McPherson attempted to avoid McPherson's duty under the medical staff by-laws to recommend for or against Dr. Koch's reappointment by asking the committee itself to recommend against his reappointment. However, the chairman of the credentials committee required McPherson to recommend or not recommend Dr. Koch's reappointment on the prescribed form pursuant to the

medical staff bylaws. McPherson then recommended Dr. Koch's reappointment by completing and signing the required "reappraisal" form. Dr. Koch was then reappointed for the 1987 calendar year.[9]

D. The Campaign To Discharge Churchill

On January 5, 1987, Churchill received her evaluation covering the preceding six months.[10] That evaluation showed standard or above standard performance in all 50 objective categories of performance. It showed that she had corrected what Waters had perceived was a problem in the June, 1986, evaluation of not "separating personal from professional concerns", a reference to what MDH perceived as Churchill's friendship with Dr. Koch. The evaluation also specified that Churchill "display[ed] a positive attitude" and was "constructively working to change things which should be changed." A. 125. At the conclusion of the printed form of evaluation, however, Waters wrote by hand that she observed "negative behavior" on Churchill's part.[11] Waters did not specify any

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[9] For the last two years Dr. Koch has served as the duly elected chief of the medical staff.

[10] Throughout her entire employment history at MDH, Churchill had received standard to above standard employment evaluations.

[11] The handwritten comments read in full: "Cheryl exhibits negative behavior towards me and my leadership – through her actions and body language, i.e. no answer, one word abrupt answers followed by turning around and leaving, blank facial expressions or disapproving facial expressions. This promotes an unpleasant atmosphere and hinders constructive communication and cooperation."

incident. Waters met with Churchill on January 5, 1987, respecting the evaluation. They had a "professional" discussion relative to OB staffing policies. Waters did not elaborate on her handwritten note about "negative behavior."

In fact, however, Waters had written the "negative behavior" remarks on the evaluation form after consultation with Davis and Hopper. They were creating a record of a "seocnd written warning" incident to MDH's "progressive discipline" scheme where the third written warning could result in discharge.

E. The January 16, 1987 Dinner Conversation

On January 16, 1987, Churchill reported for work for the 3:00 p.m. to 11:00 p.m. shift, her customary shift. By reason of a staffing change, Mary Lou Ballew was assigned to that shift as well.[12] In addition, a "cross-trainee", Melanie Perkins-Graham (Graham), was assigned to OB for that shift. Ballew arrived for work at 5:00 p.m., two hours after the shift began.

The custom on the shift was that the mothers were taken their dinners between 4:30 p.m. and 5:00 p.m. after which the nurses on duty ate, generally between 5:00 p.m. and 6:00 p.m. The nurses customarily ate in a

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[12] Ballew had been hired in August, 1986. She had just completed a 90 day probationary period. After the August 21, 1986 "code pink" C-section, she had learned from Waters that Dr. Koch and Churchill were viewed in disfavor by the MDH administration. After that date, she reported several incidents concerning Dr. Koch to Waters which displeased Ballew. Those were among the incidents Waters turned into Hopper which Hopper maintained in his file on Dr. Koch in his desk.

kitchen area situated behind but within earshot of the main nurses station.

Churchill and Graham finished their tasks after which, about 5:00 p.m., they went to the kitchen area to eat their dinners just as Jean Welty, the shift supervisor and senior nurse in OB was leaving. Welty went to the desk area where she answered the phone announcing a new patient. Ballew, having just arrived at work, was standing behind the main desk. Ballew could not see who was in the kitchen area but could hear voices through the open door. Prior to January 16, Ballew did not know Graham and had only an acquaintance with Churchill.

Sometime after his office closed at 5:00 p.m., Dr. Koch arrived to do his customary rounds. After his rounds, Dr. Koch went into the kitchen area where Churchill and Graham were eating. He asked Graham what she was doing in OB and she said she was there to cross-train and was thinking about transferring to OB. Graham said that she was glad it was not busy because it was difficult to cross-train in OB.

With that statement, Churchill, Graham, and Dr. Koch began a general 20 minute discussion about the cross-training policy. Shift supervisor Welty, who was filling out a chart on the new patient at the desk immediately outside the door, listened "very closely" to the conversation because she was interested in how Graham from the general surgical, a less specialized nursing floor of MDH, reacted to the cross-training policy.

Welty heard Dr. Koch express his views that cross-training's application in OB harmed patients and increased malpractice risks and costs. She heard

Churchill agree and say further that Davis' policy as it was being implemented in a sporadic, hit or miss fashion was going to "ruin" the Hospital. She also heard Churchill say that sending a cross-trainee to OB in place of a regular OB staff nurse to create the appearance of complying with Illinois Department of Health regulations was probably a violation of those regulations. Welty said Graham agreed with those views and that all participants contributed equally to the conversation. At the end of the conversation, Welty heard Graham say she was considering transferring to OB but heard bad things about Cindy Waters. Welty heard Churchill encourage her to transfer, saying that Cindy Waters had good intentions but was sometimes "moody".

Churchill also provided testimony about the conversation. She recalled saying that cross-training as a concept had merit if applied effectively. She said that to be effective, cross-training had to be structured with the same people participating on a regular basis to achieve consistent and frequent exposure to the Obstetrics Department. Churchill recalled that she said that the cross-training program was not fair to patients because when a nurse cared for a patient, the patient was entitled to assume that the nurse was knowledgeable which was not the case if the nurse was in fact a cross-trainee. She also recalled saying that in an emergency situation, a cross-trainee would not be competent which was unfair to the patient.

Churchill admitted she said that Davis' cross-training policy was going to "ruin the Hospital" if it were not changed. She said that Davis and the administration were more concerned about marketing and business matters

than the delivery of nursing services and that Waters concurred with the administration.

Churchill further testified that at the end of a 20 minute conversation, Graham said she heard that Waters was difficult but did not know her personally. Churchill replied that Waters "had her moods" owing to the stress of her job but that should not deter Graham from transferring to OB. Churchill described the situation in her last evaluation (January 5) when Waters had given Churchill a good evaluation both on the form and verbally but had written inconsistent remarks at the end of the evaluation which had "confused" Churchill.

Dr. Koch corroborated Welty's and Churchill's recollection of what was said. He recalled Graham commenting she had heard criticisms of Waters and Churchill attributing those criticisms to Waters' moods. He remembered those remarks came in the last two minutes of what he recalled was a 15 to 20 minute conversation.

Ballew testified she was answering patient lights when the conversation was taking place. She did not see who was in the kitchen area, just heard voices. She heard "snatches and pieces" and less than one minute of the conversation and was not paying much attention to it.

F. The Ballew And Graham Reports Of The Conversation

Nevertheless, Ballew assumed that the conversation was negative and had dampened the "enthusiasm" of Graham, although she never talked to Graham about the conversation. Four days later, on January 20, 1987, Ballew

orally advised Waters that she (i) "overheard something the other night on the 3-11 shift which was not good and . . . should not be happening and [Ballew] [wanted] [Waters] to be aware of its happening," and (ii) that "Cheryl took Melanie . . . into the kitchen for a period of at least 20 minutes to talk about you and how bad things are in OB in general." Waters advised Hopper and Davis of what Ballew had told her.

On January 23, 1987, Davis and Waters met with Graham in Davis' office. Graham was "nervous", "frightened" and "reluctant to talk." Waters and Davis told Graham they heard that Churchill had criticized the Hospital and they wanted confirmation of what they had heard. They told Graham she need not worry. Graham agreed to talk and said "she would not lie about it." Graham then agreed that Churchill had said (i) "unkind and inappropriate negative things about Cindy Waters"; (ii) "that just in general things were not good in OB and the Hospital administration was responsible"; (iii) that Kathy [Davis] was "ruining" the Hospital; (iv) that Churchill had discussed her evaluation and that Waters wanted to wipe the slate clean; and (v) that Churchill had said that Waters had knowledge of everything Churchill was saying because Churchill had said it directly to Waters. Graham said she could not remember the conversation "very specifically" but did remember that it took 20 minutes. Neither Waters nor Davis asked Graham whether her enthusiasm had been "dampened" by her conversation with Churchill and Graham did not say it had been.

Waters had one subsequent meeting with Ballew at which Ballew confirmed what she initially reported and

agreed to "swear" to it. Waters, Davis and Hopper did not question anyone else concerning the conversation. Davis believed Ballew's and Graham's reports provided all the evidence they needed to terminate Churchill.

G. The Discharge of Churchill

On January 26, 1987, Hopper, Waters and Davis met and decided to terminate Churchill which Waters and Davis did on January 27, 1987. They told her she had continued to "undermine the department and Kathy Davis and the whole administration." Waters and Davis were referring to Churchill's speech of January 16, 1987. Waters admitted that Churchill's speech as reported could have been criticism of the cross-training policy. A. 767-768, 771-772.

After she was discharged, Churchill filed a grievance with Hopper.[13] Hopper upheld Churchill's discharge and concluded that Churchill's speech was her third offense within a twelve month period, the written warning of August 25, 1986, and the "negative behavior" comments at the end of her January 5, 1987, evaluation being the first two. Hopper admitted that Churchill's speech of January 16 as reported could have concerned the cross-training policy, A. 484-489, 524-530. Hopper took offense

[13] She was told by the personnel director that since her grievance challenged her firing, it properly lay against Waters and Davis who, Churchill was advised, had effected her discharge. She was not told that Hopper also played a major part in effecting her discharge.

at Churchill's statement that Davis was "ruining the Hospital." He felt that statement "undermin[ed] the work Kathy Davis [was] trying to do in the Hospital" because he "[didn't] agree with the statement." Beyond that, all Hopper could say was wrong with Churchill's speech was that "she was voicing it to the wrong forum." A. 484-489. However, Hopper did not permit Churchill to discuss the cross-training situation when she met with him in furtherance of her grievance, saying "he didn't want to get into that." Pet. App. 75-76.

Jean Welty, the shift supervisor who heard all of Churchill's speech, testified that it disrupted nothing. Most OB nurses had never heard of Churchill's conversation. Welty felt Churchill was discharged because of her friendship with Dr. Koch, a view shared by medical chief of staff, Dr. Lefler.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS RELY ON FACTUAL ASSERTIONS THAT ARE EITHER NOT SUPPORTED OR ARE IN DISPUTE IN THE SUMMARY JUDGMENT RECORD.

"On summary judgment, the inferences to be drawn from the underlying facts contained in such [summary judgment], materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold*, 369 U.S. 654, 655 (1962). Petitioners, however, characterize the factual record in the light most favorable to themselves though they were the moving parties. They

do that in three particulars, the character of Churchill's speech, the quality of the reports concerning her speech they received, and Churchill's employment history.

A. On Summary Judgment, Churchill's Speech Cannot Be Characterized As "Insubordinate."

Permeating the entirety of the Petition is the characterization of Churchill's speech as "insubordinate". On the record, the most that can be said about Churchill's speech as reported to the Petitioners which inspired their retaliatory action is that it was critical of policies of MDH supervisory personnel, but consistent with the public mission of MDH.

This case is contrary to the situation in *Connick v. Myers*, 461 U.S. 138, 154 (1983),[14] where only one out of fourteen items on the plaintiff's questionnaire referred to a matter of public concern. Here, of the seven items reported to Petitioners by Graham and Ballew, only one, the statement concerning Churchill's evaluation, most likely did not involve a matter of public concern. As acknowledged by both Waters and Hopper, the remaining points as reported could as well have involved criticism of cross-training and nurse staffing policies (p. 13, *supra*)

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[14] Petitioners rely on the *Connick v. Myers* statement that a "public employer need not 'tolerate action which he reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships,' " Pet. at 11. However, *Connick* applies where the public employee's speech implicates the public concern "in only a most limited sense . . . " and the overall import of the speech is "most accurately characterized as an employee grievance concerning internal office policy." 461 U.S. at 154.

which Churchill said were contrary to effective patient care and which the Petitioners have admitted to be matters of "obvious public concern." Petitioners' Brief in Court of Appeals, p. 38.

B. On Summary Judgment, Ballew's And Graham's Reports Cannot Be Characterized As "Credible."

Petitioners' statement of the quality of the reports they received as "credible", Pet. i, 12, 20, is erroneous on summary judgment, *United States v. Diebold, supra*, as it is disputed and not supported by the record. For example, the evidence showed that Ballew (i) was answering patient lights when the speech took place, A. 900; (ii) did not see who was in the kitchen area, but just heard voices, *Id.*; (iii) heard only "snatches and pieces" and "bits and pieces" of the conversation, A. 887, 900, 903, 905-907; (iv) was not paying attention to the conversation, A. 902-903; (v) said the conversation "[didn't] make any sense" to her, A. 905; (vi) heard only 50 seconds of what she thought was a 45 minute conversation. A. 906.[15] The evidence also showed that Graham's report was not reliable because, as Petitioners' own notes show, Graham (i) was "intimidated" and "reluctant to talk" and (ii) "could not remember everything specifically. . . . [16] A. 146.

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[15] Petitioners state that they spoke to Ballew three times. Pet. 17. That is inaccurate. They spoke to her one time and confirmed with her what she had said in a second meeting and got her to agree to "swear" to it.

[16] She had reason to be "reluctant" as Churchill's evidence showed it was Graham, not Churchill, who made comments personally derogatory of Cindy Waters. And, far from the

C. On Summary Judgment, Churchill's Work History Cannot Be Characterized As "Insubordinate."

Petitioners have relied on disputed assertions concerning Churchill's work history. Up to two weeks before her discharge, she was, as acknowledged by Petitioners, a standard to above standard employee who "display[ed] a positive attitude" and was "constructively working to change things which should be changed." A. 125. Two weeks before her discharge, she was recommended for a raise. Nevertheless, she was perceived by Petitioners as an ally of Dr. Koch's respecting nurse staffing issues. That perceived alliance caused them both to be the subject of Petitioners' retaliatory efforts beginning in the late summer, 1986, which resulted in Churchill's discharge.

II.

THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS AS IT ADHERES TO THE STANDARD PROHIBITING ONLY INTENTIONAL VIOLATIONS OF PUBLIC EMPLOYEES' RIGHT TO SPEAK ON MATTERS OF PUBLIC CONCERN.

A.

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court held that a plaintiff

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speech "dampening the enthusiasm" of Graham as assumed by Ballew, shift supervisor Welty testified she talked to Graham at the end of the shift and Graham told Welty, "she had enjoyed working with [the OB nurses] and would give careful consideration" to transferring to OB. A. 421-422. Welty also testified that she was never questioned by MDH administrators concerning the speech or any effect it may have had.

was obligated "to show that [her] conduct was constitutionally protected, and that this conduct was a 'substantial factor' – or to put it in other words, that it was a 'motivating factor' " in the termination decision. 429 U.S. at 287. In *Mt. Healthy*, the Court followed a test of causation which it had previously established in discrimination contexts. *Village of Arlington Heights v. Metropolitan Housing District*, 429 U.S. 252, 264-65 (1977) and *Washington v. Davis*, 426 U.S. 229 (1976).

The Seventh Circuit adhered to the *Mt. Healthy* test of causation in this case. It did so by holding that speech was conduct and the plaintiff by having shown that she was fired for having engaged in the conduct of speech which could have been on a matter of public concern had satisfied the *Mt. Healthy* causation test. The court held that it was not necessary that the employer knew the "precise content of the speech." 977 F.2d at 1127. That decision is consistent with long established First Amendment principles.

The Court of Appeals in this case did no more than interpret *Mt. Healthy* so as to "be sure that the speech in question actually [fell] within the unprotected category." *Bose v. Consumers Union*, 466 U.S. 485, 505 (1984). It did no more than apply the *Mt. Healthy* causation so as to "confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression [would] not be inhibited." *Bose, supra.*

The Seventh Circuit's application of *Mt. Healthy* to this case is sound, fair, practical and consistent both with protection of First Amendment values and the legitimate

concerns of public employers. The Petitioners have conceded that Churchill's speech was protected conduct if on a matter of public concern. They have conceded her speech as conduct was the motivating cause of her discharge. They have admitted that for all they knew her speech was on cross-training and was, therefore, on a matter of public concern. Defendants have, therefore, implicitly conceded that they may have intentionally terminated Churchill because she engaged in constitutionally protected speech. The only issue is whether the speech was in fact on a matter of public concern. The resolution of that issue, as the Seventh Circuit correctly held, depends upon whether a fact finder believes plaintiff and her witnesses or Ballew and Graham. *Mt. Healthy, supra.*

B.

In addition, the record shows Churchill's speech was given in a context broader than the Petitioners paint. It shows a context from which the intent to punish Churchill because of her views can be demonstrated. As held by this Court in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 267 (1977), "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." Thus, the Court said, "[t]he specific sequence of events leading up to the challenged decision . . . may shed some light on the decision maker's purposes." *Id.*

The record as it must be viewed on summary judgment, *United States v. Diebold, supra,* shows that Hopper,

Waters and Davis were hostile to Dr. Koch and his insistence that proper staffing levels be maintained. Moreover, Dr. Koch's position, supported by Churchill, respecting staffing was at odds with the attempted implementation of the cross-training policy in OB. After the dispute created during the emergency caesarean section, "code pink" of August 21, 1986, when Waters ordered Churchill from the operating room, the Petitioners put in motion the strategy to strip Dr. Koch of his staff privileges and to fire Churchill. The strategy failed as to Dr. Koch, but it succeeded as to Churchill as a result of her speech of January 16, 1987.

III.

THE LOWER COURT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF ANY CIRCUIT AND THE CASES RELIED UPON BY PETITIONERS ARE DISTINGUISHABLE ON THEIR FACTS.

Petitioners rely on *Wulf v. City of Wichita,* 883 F.2d 842 (10th Cir. 1989), and *Sims v. Metropolitan Dade County,* 972 F.2d 1230 (11th Cir. 1992), as being in conflict with the decision below, The decision below, however, is fully reconcilable with both *Wulf* and *Sims.*

The question in *Wulf* was whether city manager Denton who relied on Police Chief LaMunyon's report that plaintiff was "insubordinate" in firing plaintiff was liable under §1983. The evidence in *Wulf* showed that Denton was not motivated at all by Wulf's speech when he decided to terminate Wulf. Rather, Denton had been told that Wulf had improperly refused to comply with a police department investigation. 883 F.2d at 862. Thus, Wulf's

speech "was not a substantial motivating factor in *Denton's* decision", *Id.* at 863 (emphasis in original), and Denton had no obligation to investigate the full content of Wulf's speech. That is contrary to the situation in this case where Petitioners knew that Churchill had criticized her superiors and terminated her precisely for that reason.

Of course, only Hopper is a possible beneficiary of *Wulf* because Waters and Davis knew the details about the contents of Churchill's speech. But, that benefit would apply only had Hopper not played, as he did, a substantial role in instigating the discharge of Churchill. For example, *Wulf* would help Hopper had Hopper merely reviewed a recommendation by Waters and Davis to terminate Churchill for "insubordination" altogether without reference to speech and he then failed to look behind the report to determine that speech was involved.

But, unlike the situation of Denton in *Wulf*, Petitioners in this case were dealing with reports of only Churchill's speech, not with conduct at all. The Petitioners had no license on the basis of those reports to unilaterally construe the speech as personal and unprotected and discharge her. If that rule were adopted, the right of public employee free speech on matters of public concern would be effectively eliminated. The rule would encourage all employers to refuse to investigate the truth because they could hide behind their deliberate ignorance of the content of the employee's speech.

Sims v. Metropolitan Dade County, supra, likewise does not conflict with the Seventh Circuit's decision. In *Sims*, the plaintiff was employed by Dade County to "investigate concerns of the Miami community's various ethnic

groups and attempt to ease the tensions among such groups." *Sims, supra,* 972 F.2d at 1232. Sims also served as a Baptist minister to a congregation consisting of primarily African-Americans separate from his governmental duties.

Racial tensions developed in Miami between African-Americans and Cubans. In a sermon given at his church, Sims made statements reported by a Spanish language newspaper which the Cuban community construed as inflammatory. Sims claimed he was misquoted. The defendants suspended him for three days on the basis of the newspaper reports of his statements even though they were aware of his claim that he was misquoted.

The Eleventh Circuit in *Sims* said that the law did not require "omniscience" on the part of employers in investigating employee conduct. *Sims, supra,* 972 F.2d at 1234. Churchill agrees. But, the court did say that the law did require an investigation "thorough enough to support a reasonable person's conclusion that action based [on employee conduct] would not violate clearly established law." *Id.* In *Sims*, the employer *did* conduct a reasonable investigation and concluded the content of Sims' speech was "inflammatory." *Sims* is plainly distinguishable from this case where the ultimate firing authority, Hopper, conducted no investigation into Churchill's speech and refused to allow her to present her side of the story in support of her grievance.

Thus, the *Sims* requirement of reasonableness is not met when, as in this case, an employer takes action on the basis of the report of an eavesdropper who hears 50 seconds of a speech she didn't understand and confirms

the report in a coercive setting from someone whom the employer acknowledges didn't remember the speech specifically. That is manifestly so when, on the basis of the report and confirmation, the employer acknowledges the speech could have been either protected or unprotected depending upon what in fact was said and was not otherwise contrary to the employee's job function or the mission of the agency. *Sims* does not help the Petitioners in this case. Rather, by emphasizing that an employer act reasonably in response to critical speech by personnel, it underscores the correctness of the Seventh Circuit's decision.[17]

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[17] Petitioners also cite *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), a patronage discharge/hiring case. The court in *Tanner*, however, simply refused to find any inference of a political animus in the hiring of the newly elected sheriff's deputies or the firing of the defeated opponents from the fact of the election followed by the fact or personnel changes. The court painstakingly went through the snippets of testimony relied upon by the plaintiffs to show such animus and any fair reading of those snippets demonstrates the correctness of the court's decision. In *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979), which is likewise distinguishable, a judge who oversaw a county probation department did no more than rely upon the report of his chief probation officer about plaintiff's activities which consisted of on-premise speech critical of her fellow employees which occurred before this Court's decision in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), which held that on-premise public employee speech is protected. Thus, the right plaintiff asserted was not clearly established. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

IV.

THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS AS ENSURING THAT SPEECH THAT COULD BE PROTECTED SPEECH ON MATTERS OF PUBLIC CONCERN IS NOT PUNISHED BY RETALIATORY ACTION.

In *Speiser v. Randall*, 357 U.S. 513, 521 (1957), this Court held that "before a [public employer] undertakes to restrain [and punish] unprotected speech, it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights – rights which we value most highly and which are essential to the workings of a free society." Cf. *Mt. Healthy, supra*, 429 U.S. at 287. In *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986), this Court affirmed the Seventh Circuit in holding that "First Amendment rights are fragile and can be destroyed by insensitive procedures." *Chicago Teachers, supra*, 475 U.S. at 303 n.12. Thus, " 'procedural safeguards . . . have a special bite in the First Amendment context.' " *Id.* That is because the First Amendment "requires that procedures be carefully tailored to minimize the infringement." *Id.* "[T]he purpose of [those] safeguards [is] to ensure that the government treads with sensitivity in areas freighted with First Amendment concerns." *Id.*[18]

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[18] See for example the different contexts in which procedural safeguards are applied to ensure that potentially protected First Amendment activity is not infringed by efforts to restrict or punish unprotected activity. Monaghan, *First Amendment Due Process*, 83 Harv.L.Rev. 518, 520-524 (1970).

The essential principle set forth in *Chicago Teachers* was earlier acknowledged by this Court in a retaliatory discharge setting in *Board of Regents v. Roth,* 408 U.S. 564 (1972). There, relevant to this case, this Court said that when the state has "directly [impinged] upon interests in free speech or free press, . . . opportunity for a fair adversary hearing must precede the action [to determine], whether or not the speech or press interest is clearly protected under substantive First Amendment standards." *Board of Regents v. Roth, supra,* 408 U.S. at 574-575 n.14. However, this Court in *Roth* declined to apply that principle because allegations of direct impingement of protected speech were not before it. But, this case squarely presents allegations of direct governmental impingement of protected speech.

The whole point of employing "sensitive procedures" before taking action which might infringe First Amendment protected freedoms is a corollary of the rule of *Connick v. Myers, supra,* 461 U.S. at 148, that a court must consider the "whole record" and of *Rankin v. McPherson,* 483 U.S. 378, 386 n.9 (1987), that a court must "assure [itself] that the judgment 'does not constitute a forbidden intrusion on the field of free expression.' " For that proposition, this Court in *Rankin* relied upon its earlier decision in *Bose v. Consumers Union, supra,* 466 U.S. at 507-508. In *Bose,* 466 U.S. at 504 n.22, the Court recognized that statements of public employees not on matters of public concern were unprotected speech which were required to be kept within "narrow limits." The Court said:

> "the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the

> judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an *independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not inhibited."*

Bose, supra, 466 U.S. at 505 (emphasis supplied). The Seventh Circuit in this case followed its obligations under *Bose, supra.*

V.

IT WAS CLEARLY ESTABLISHED IN JANUARY, 1987, THAT A PUBLIC EMPLOYEE COULD NOT BE DISCHARGED FOR ENGAGING IN ON-PREMISES PRIVATE SPEECH ON A MATTER OR PUBLIC CONCERN WHICH DID NOT INTERFERE WITH THE EMPLOYER'S DISCHARGE OF THE PUBLIC FUNCTION.

After *Anderson v. Creighton,* 483 U.S. 635 (1987), a court must determine whether a public official violated clearly established rights in light of the information reasonably available to him. The question in this case for qualified immunity purposes is, whether it was clearly established in January, 1987, that a public employee had a right to engage in on-premises private speech which the employer knew could have been on a matter of public concern critical of the policies of the public employer. That is the level of specificity at which this case must be analyzed, *Anderson v. Creighton, supra,* 483 U.S. at 641, because that what the Petitioners knew when they fired

Churchill. The affirmative answer to that question was given in *Pickering, supra,* in 1968, in *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979), in 1979 and in *Bose v. Consumers Union, supra,* in 1984.

Petitioners say, "there was nothing to put them on notice that Ballew's and Graham's reports might be inaccurate or that Churchill's speech might have focused on matters of public concern, because they were of public concern." Pet. 20. They say the Seventh Circuit has created a "standardless duty to investigate."[19] Petitioners

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[19] In their Petition at 21, n.18, the Petitioners argue that the Seventh Circuit ignored its own holding in *Elliott v. Thomas,* 937 F.2d 338 (7th Cir. 1991). That is inaccurate. *Elliott v. Thomas* involved the plaintiff Barbara Probst who had been transferred from the university laboratory for what she claimed was speech criticizing her superior's alleged conflict of interest. But, the university officials were advised only that the conditions in the laboratory had deteriorated because of a bad personnel situation altogether without reference to speech. The university said they transferred her for that reason. The Seventh Circuit held that the question for qualified immunity purposes was "not what the conditions in the laboratory *were;* it is what the administrators reasonably believed them to have been." 937 F.2d at 343, 344 (emphasis in original). Probst offered "no reason other than her suspicions to doubt the [university's] account of its [actions]. 937 F.2d at 346.

Petitioners argue that doctrine applies to this case. They say the characterization of Churchill's speech, "negative" and "inappropriate" by Ballew and Graham puts them in the same position as was the university when it heard that conditions had deteriorated and transferred Probst for that reason.

Two fundamental points defeat Petitioners' position. First, they cannot escape that it was Churchill's speech, not deteriorating conditions, or anything else which precipitated her discharge. Second, they have admitted her speech may have been protected as being on a matter of public concern. A third point

have overlooked this Court's precedents regarding values protected by the First Amendment in light of qualified immunity principles.

Petitioners were on notice from 1968 that public employee speech on matters of public concern was presumptively protected. *Pickering v. Board of Education, supra.* From Ballew and Graham, they received reports that Churchill's speech was critical of MDH and supervisory personnel. They have conceded those reports could have encompassed protected speech. In light of that information, a reasonable officer could not have failed to believe that Churchill's speech was potentially protected. *Hunter v. Bryant,* 112 S.Ct. 534, 536 (1991). Consequently, a reasonable official could not have failed to realize that taking retaliatory action necessarily risked punishing protected speech. *Id., Pickering, supra; Bose, supra,* 466 U.S. at 505; *Connick, supra.*

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also distinguishes this case from *Elliott v. Thomas,* and that is that it was not reasonable for Petitioners to accept Ballew's and Graham's report as accurately representing Churchill's speech or its effects. See discussion, *supra,* at 17.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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No. 92-1450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,

Petitioners,

v.

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

The petitioners Cynthia Waters, Kathleen Davis, Stephen Hopper and McDonough District Hospital ("defendants") submit this reply brief in support of their request that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on October 15, 1992 and December 9, 1992.

INTRODUCTION

This case presents important and unresolved questions arising out of the tension between the right of public employees to engage in speech protected by the First Amendment and their employers' right to discipline them for speech not so protected. In *Connick v. Myers*, 461 U.S. 138 (1983), this Court held that a public employer need not "tolerate action which he *reasonably believe(s)* would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154 (emphasis added). Respondent Cheryl R. Churchill ("Churchill")[1] was terminated after defendants received reports that she had engaged in precisely this form of behavior during a conversation with a fellow employee. Churchill claims that the reports were erroneous and that she actually was engaged in protected speech on an issue of public concern. Below, she conceded that defendants never knew this before her termination, allegedly because of an inadequate investigation of the reports they received.

In her opposition to the petition, Churchill now contends that the reports could have referred to protected speech, and she says that a more thorough investigation would have disclosed the true nature of her speech. This is pure

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[1] Since Churchill is the only active litigant of the two respondents, defendants will refer to respondents as "Churchill" throughout this brief.

speculation and irrelevant. In any retaliatory discharge action, the question before the court is what motivated the defendants when they decided to terminate the plaintiff. Here, there was no evidence that defendants were motivated by speech on matters of public concern because no such speech was reported to them. Defendants say the inquiry ends there; Churchill (and the Seventh Circuit) disagree. Either way, the issues raised by this case are of vital importance to all public employers, the Seventh Circuit's decision runs contrary to this Court's guidance in other First Amendment retaliatory discharge cases, and what guidance exists in other circuits as to these issues conflicts with the Seventh Circuit's holding.

In her haste to disagree with defendants and to agree with the Seventh Circuit, Churchill loses sight of the purpose of a petition for writ of certiorari and response thereto—to inform this Court as to why it should or should not hear the case. The question here is whether the Seventh Circuit's extraordinary holding (that defendants can be held individually liable *regardless* of what they knew of Churchill's speech at the time of termination) raises "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). Churchill's brief contains no argument to the contrary.

REASONS FOR GRANTING THE WRIT

I.

The Reports on Which Defendants Relied Disclosed Only Unprotected, Insubordinate Speech.

Throughout her brief in opposition, Churchill contends that defendants "conceded" that the reports they received from Mary Lou Ballew ("Ballew") and Melanie Perkins-Graham ("Graham") could have referred to "protected

speech." Nothing could be further from the truth. In moving for summary judgment, defendants contended that Churchill's statements to Graham (including *Churchill's own version* of those statements) did not constitute protected speech because Churchill was not raising issues of public concern because they were of public concern. The district court granted summary judgment on this ground. For Churchill now to assert that defendants conceded that Churchill's speech could have been protected turns this case on its head.

Churchill cites deposition testimony in which defendants Hopper and Waters said they did not know what Churchill actually said to Graham (because they were not there). It is true that Churchill could have discussed cross-training with Graham during the conversation in which she also made the remarks reported to defendants. But defendants always have maintained that the content, form and context of Churchill's remarks to Graham rendered them unprotected, even if cross-training was one of the subjects discussed.

In the Seventh Circuit's view, defendants can be held liable if it is eventually determined that Churchill discussed issues of public concern, even if, based on the reports they received, defendants believed Churchill's comments were of the type held unprotected in *Connick*. Churchill's speculation—years later—as to how the reports might have been (but were not) construed does not support this extraordinary holding or make it less worthy of review by this Court.

Churchill spends considerable time describing her view of facts which are irrelevant to the questions presented for review. For example, she cites deposition testimony given long after her termination for the proposition that defendants should not have believed Ballew's and Graham's reports. But it was undisputed below that defendants *did*

believe these reports. Defendants have requested this Court's review because the Seventh Circuit held defendants can be held liable *even though* they believed the reports. Suggestions that Ballew did not hear the entire conversation or that Graham was nervous when interviewed by defendants have nothing to do with the issues raised here.

To the extent this Court might be influenced by the picture Churchill attempts to paint, it should be noted that she has misstated the facts. For example, she takes issue with defendants' position that they spoke to Ballew three times before the final termination decision was made. In her brief, Churchill concedes that two meetings took place. (Respondents' Brief in Opposition ("Resp. Brief"), p. 17 n.15). But she ignores the fact that Hopper had the Hospital's vice president of human resources interview Ballew one more time after the grievance meeting with Churchill. (Supp. A. 139-43, 147). During this meeting, Ballew once again confirmed the substance of her report to Waters regarding Churchill's negative comments about Waters and Davis. (*Id.*).

Churchill also misstates the facts when she contends that Ballew "heard only 50 seconds of what she thought was a 45 minute conversation." (Resp. Brief, p. 17). Ballew testified as follows at her deposition:

> Q. Now, you say the conversation took 45 minutes?
>
> A. At least.
>
> Q. All right. Now, do you have a second hand on your watch, Mr. Reporter?
>
> (Whereupon the reporter handed his watch to Mr. Bisbee.)
>
> Q. Okay. You heard Cheryl say that Cindy was out to get Cheryl fired. You heard Cheryl say that Cindy had complained about treatment that Cheryl gave a patient which Cheryl denied but

> Cindy persisted in her accusation. You heard Cheryl say that she disapproved of the check list. You heard Cheryl say that she always scheduled her own duty when three RNs were on board so that Cheryl would be less exposed to being called. You heard Cheryl complain that Cindy was not a good manager and didn't run the department well. Is that right?
>
> A. Those are the things I can specifically remember, yes.
>
> Q. All right. I want the record to reflect that my recitation of those things comprised 50 seconds. So, and you didn't report anything else to Cindy Waters, is that right, Mrs. Ballew?
>
> A. I reported that the general conversation was a tirade against the department.

(A. 906-07).[2] The only thing that took 50 seconds was Churchill's counsel's recitation of the (unprotected) subjects Ballew heard Churchill discuss with Graham.[3] There was no testimony that Ballew heard only 50 seconds of conversation.

Finally, Churchill disagrees with defendants' characterization of the reported comments as "insubordinate." Here again, the relevant point is that defendants *did* construe the reported speech as insubordinate, not that it might have been construed in a different way. Both the content of the reports and Ballew's and Graham's characterizations of what Churchill said were undisputed below. They supported defendants' belief that Churchill was engaging in speech of the kind found unprotected in *Connick*. The Seventh Circuit's holding that this belief was "immaterial"

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[2] This is the section of the record cited in Respondents' Brief in support of the 50-second contention.

[3] Churchill's counsel's own summary of the comments overheard and reported by Ballew belies Churchill's assertion that the reports "could have referred to protected speech on matters of public concern."

if Churchill in fact spoke on an issue of public concern merits review by this Court.

II.

The Seventh Circuit's New Standard for First Amendment Retaliatory Discharge Actions Cannot Be Reconciled with This Court's Holdings in *Mt. Healthy* and *Connick*.

As Churchill readily concedes, this Court's First Amendment retaliatory discharge cases require that a plaintiff "show that his conduct was constitutionally protected, and that this conduct was a . . . 'motivating factor' in the [employer's] decision" to terminate him. *Mt. Healthy City School Dist. Board of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). In Churchill's (and the Seventh Circuit's) view, this means that a public employer may be held liable for retaliatory discharge even when the discharge is based on reports of unprotected speech—if it is later shown that the reports were inaccurate and that the employee actually spoke on protected matters of public concern. In light of *Connick*'s holding that public employers *can* terminate employees for unprotected speech, the Seventh Circuit's view of *Mt. Healthy* cannot stand. Otherwise, an employer motivated by what it believes is speech unprotected under *Connick* still can be held liable if it is mistaken as to the content of such speech. Such a result cannot be reconciled with *Mt. Healthy*'s requirement that the plaintiff show retaliatory intent on the part of the employer.

The other decisions of this Court cited by Churchill as consistent with the Seventh Circuit's view have nothing to do with the questions presented for review. For example, in *Speiser v. Randall*, 357 U.S. 513 (1958), this Court considered a challenge to California's requirement that veterans sign a loyalty oath in order to receive a state tax exemption. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), this Court reviewed the method

used by a public employee union to determine the fees to be paid by non-member employees. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court did have before it a First Amendment retaliatory discharge claim. But there, the Court rejected the theory, espoused by Churchill (and apparently by the Seventh Circuit), that a pre-termination hearing is required "as a *prophylactic* against non-retention decisions improperly motivated by exercise of protected rights." *Id.* at 575 n.14 (emphasis in original).

None of these cases establishes any standard of "due process" which public employers must meet before terminating employees based on reports of insubordinate speech. The Seventh Circuit's standardless duty to investigate finds no support here. And its holding that public employers can be held liable for retaliatory discharge without any retaliatory motive runs directly contrary to *Mt. Healthy*. Churchill's contention that the Seventh Circuit's view is supported by cases involving loyalty oaths and union dues is further evidence that this case presents an important and unresolved question.

This Court never has decided a case in which an employer acted on reports of speech which differed significantly from the actual speech alleged by the plaintiff. This is such a case. The parties disagree as to where *Mt. Healthy* leads when applied to such a scenario, but it cannot be disputed that the path is uncharted.

III.

No Circuit Court of Appeals Has Found That a Public Employer Must Investigate More Fully Than Defendants Did Here.

In her brief, Churchill says that all of the circuit court of appeals decisions cited by defendants can be distinguished on their facts. That is beside the point. None of these cases involves facts identical to those presented

here. But each sets forth a principle which conflicts with the Seventh Circuit's holding.

In *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), the court held that a negligent investigation into the circumstances surrounding a public employee's termination "cannot form the basis for a First Amendment claim." *Id.* at 863. In *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979), the court held that a public employer has no duty to conduct an independent investigation before relying on reports by subordinates that a public employee engaged in unprotected speech. *Id.* at 1064. In *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir. 1992), the court found that an investigation need only "be thorough enough to support a reasonable person's conclusion that action based thereon would not violate clearly established law." *Id.* at 1234. In *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981), the court held that "[p]rima facie proof of a constitutional violation must include evidence of impermissible motive." *Id.* at 1193. In *Bell v. School Board of City of Norfolk*, 734 F.2d 155 (4th Cir. 1984), the court held that a plaintiff must prove "evil motive" to prevail in a First Amendment retaliatory action. *Id.* at 157.

Each of these holdings is consistent with defendants' view of *Mt. Healthy* and contrary to the Seventh Circuit's view. At the very least, the decisions in other circuits are likely to cause confusion which can only be resolved by this Court.

IV.

This Court's Decision in *Hunter v. Bryant*—Relied upon by Churchill—Supports Defendants' View of Qualified Immunity.

In her brief, Churchill merely parrots the Seventh Circuit's limited view of the scope of qualified immunity here. Like the Seventh Circuit, she ignores the requirement

that the right at issue be "clearly established" in light of the information possessed by the public official at the time he or she acts. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Churchill is no more successful than the Seventh Circuit in finding any precedent for a "duty to investigate" here. This absence of precedent alone undercuts any assertion that the duty described by the Seventh Circuit was "clearly established." *Procunier v. Navarette*, 434 U.S. 555, 563-64 (1978). Nor does Churchill cite any case supporting the Seventh Circuit's view that defendants can be held liable "regardless of what [they] *knew*" [emphasis in original] and even if their lack of knowledge was "accidental." Indeed, the one additional case cited by Churchill holds to the contrary. *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1991) (per curiam).

In *Hunter*, this Court reaffirmed *Anderson's* holding that a public official is entitled to qualified immunity if he "could have believed" that his actions were lawful, even if that belief was "mistaken." The Court held:

> Our cases establish that qualified immunity shields [public officials] from suit for damages if 'a reasonable [official] could have believed [his actions] to be lawful, in light of clearly established law and the information the [official] possessed.' *Anderson* . . . , 483 U.S. [at] 641. . . . Even . . . officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity. *Ibid.* Moreover, because '[t]he entitlement is an *immunity from suit* rather than a mere defense to liability,' *Mitchell v. Forsyth*, 472 U.S. 511, 526 . . . (1985), we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation. [Citations omitted].
>
> * * *
>
> [T]he court should ask whether the [officials] acted reasonably under settled law in the circumstances,

> not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Id. at 536-37 (emphasis in original).

The Seventh Circuit ignored all these principles in holding that for purposes of qualified immunity, "it is immaterial that the defendants were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern." Accordingly, the Seventh Circuit's qualified immunity holding merits review by this Court.

CONCLUSION

For these various reasons, and for the reasons set forth in the petition for writ of certiorari, petitioners respectfully request that this Court grant the petition.

Respectfully submitted,

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No. 92-1450

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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April 3, 1987	Plaintiff Churchill's complaint filed in the United States District Court for the Central District of Illinois.
April 28, 1989	Plaintiff Churchill's first amended complaint filed.
November 14, 1989	Defendants' motion for summary judgment filed.
February 16, 1990	Order entered granting Defendants' motion for summary judgment on Fourteenth Amendment and state law contract claims and denying the motion on First Amendment claim.
September 18, 1990	Plaintiffs Churchill and Koch file second amended complaint.
October 9, 1990	Defendants' counterclaim against Plaintiff Koch, motion to dismiss Count V of second amended complaint, and motion for summary judgment as to Counts I-IV of second amended complaint filed.
October 22, 1990	Plaintiff Churchill's motion for summary judgment on Count I filed.
October 30, 1990	Plaintiffs Churchill and Koch file third amended complaint.
May 17, 1991	Order entered granting Defendants' motion for summary judgment on First Amendment claim,

	granting Defendants' motion to dismiss, and denying Plaintiff Churchill's motion for summary judgment.
May 23, 1991	Judgment in favor of Defendants entered.
May 28, 1991	Notice of appeal filed.
October 15, 1992	Order and opinion of the Court of Appeals for the Seventh Circuit.
December 9, 1992	Order of the Court of Appeals denying rehearing and rehearing *in banc*.

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(4)

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QUESTIONS PRESENTED

1. Whether the court of appeals erred when it held that a public employer which terminates an employee based on believable, substantiated reports of unprotected, insubordinate speech may be held liable for retaliatory discharge under the First Amendment if a jury later finds that the reports were incomplete or inaccurate and that the employee actually spoke on protected matters of public concern, when the employer's ignorance of the protected speech is the result of an allegedly incomplete investigation.[1]

2. Whether in January 1987, public officials were immune from individual liability for discharging an employee based on believable, substantiated reports of unprotected, insubordinate speech that were later found to be incomplete or inaccurate – because (a) it was clearly established that insubordinate speech was not protected by the First Amendment and (b) it was not clearly established that public officials had a duty to investigate beyond interviewing the reporter of the speech three times and the recipient of the speech once and allowing

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[1] Fairly comprised within this question is the issue of whether the Seventh Circuit erred when it held that a jury could find that plaintiff Cheryl Churchill engaged in protected speech and that defendants were motivated by this speech when they terminated her employment.

QUESTIONS PRESENTED – Continued

the discharged employee an opportunity to discuss the speech in question.[2]

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[2] If this Court affirms the court of appeals' holding as to the first question presented but holds that the individual defendants were immune from liability, the Court may reach the question of the defendant public hospital's liability. Accordingly, Petitioners address this question herein.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Cynthia Waters, Kathleen Davis, Stephen Hopper and McDonough District Hospital and the respondents Cheryl R. Churchill and Thomas Koch, M.D.

Rule 29.1 Statement

Defendant McDonough District Hospital is an Illinois municipal corporation. It has no parent or subsidiary corporations.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 977 F.2d 1114 and is reprinted in the Appendix to the Petition for Writ of Certiorari at App. 1. The order of the Court of Appeals for the Seventh Circuit denying defendants' petition for rehearing and suggestion for rehearing *in banc* is reprinted in the Appendix at App. 30.

The order of the United States District Court for the Central District of Illinois awarding defendants summary judgment as to plaintiff Cheryl Churchill's First Amendment retaliatory discharge claim and dismissing both

plaintiffs' freedom of expressive association claims under Rule 12(b)(6) has not been reported. It is reprinted in the Appendix at App. 31. The district court's earlier order granting defendants' motion for summary judgment as to Churchill's Fourteenth Amendment due process and state-law contract claims is reported at 731 F. Supp. 311 and is reprinted in the Appendix at App. 51.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 15, 1992. A timely petition for rehearing with a suggestion for rehearing *in banc* was denied on December 9, 1992. The petition for writ of certiorari was filed on March 8, 1993 and was granted on June 21, 1993. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 1.

> Congress shall make no law . . . abridging the freedom of speech. . . .

U.S. Const. Amend. 14.

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

In this Section 1983 action, Plaintiff Cheryl Churchill ("Churchill") claims that defendants McDonough District Hospital (the "Hospital"), two of its executives and Churchill's immediate supervisor violated her First Amendment rights by firing her in retaliation for comments she allegedly made about the Hospital's policy of cross-training nurses in departments to which they were not regularly assigned. She also claimed that the individual defendants' conduct violated her Fourteenth Amendment and contractual rights to due process.[3] The following facts are material to consideration of the questions presented by this case:[4]

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[3] By order dated February 16, 1990, the district court granted defendants' motion for summary judgment as to these claims, finding that Churchill had no contractual right to (and thus no property interest in) continued employment. (Appendix to Petition for Writ of Certiorari ("App.") 70). By the time the district court disposed of this case, Dr. Thomas Koch ("Koch") had been added as a party-plaintiff who claimed that defendants retaliated against him for his opposition to the cross-training policy. Koch's claim was dismissed for failure to present a justiciable controversy. (App. 39). In the court of appeals, plaintiffs did not raise any issue as to dismissal of Koch's claim.

[4] Since the context here is summary judgment, defendants set forth herein only those facts that are both uncontroverted in the discovery filed in the trial court and relevant to the questions presented. Below, Churchill purported to dispute many of these facts, but her disputations were unsupported by record

A. History of Churchill's Employment

Churchill worked at the Hospital as a registered nurse in the Obstetrics ("OB") Department. (R. 146, Third Amended Complaint, Count I, ¶ 10). During the final year of her employment, Churchill repeatedly engaged in behavior toward Defendant Cynthia Waters ("Waters"), her immediate supervisor, which was considered by her superiors to be both rude and insubordinate. This behavior was observed not only by Waters but also by other nurses in the OB Department. (R. 72: Waters Dep. 11/19/87, pp. 245-53, 356, 386-87; Ballew Dep. 8/22/87, pp. 91-94; Haney Dep. 11/17/87, pp. 22-24, Ex. 8; Osmon Dep. 11/17/87, pp. 16-17, 20-23, 47, 52-53, 60).[5] For example, one nurse testified that Churchill polished her nails during departmental meetings, displayed "indifference and total disregard for authority," called Waters a "fat

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evidence. The court of appeals relied in its opinion on some of her non-record assertions, including some mere recitations from her Third Amended Complaint. (*See, e.g.*, App. 3-4, 13). The court thus departed from the well-settled principle that on summary judgment, the nonmovant may not create genuine issues by referring to complaint allegations, but instead must come forward with sufficient *evidence* to sustain a jury verdict in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

[5] The parties submitted appendices to the trial court containing the discovery documents upon which they relied in support of or opposition to their respective motions for summary judgment. These appendices are designated as: Appendix of Exhibits in Support of Defendants' [First] Motion for Summary Judgment ("R. 72"); Appendix to Plaintiff's Response to Defendants' Motion for Summary Judgment ("R. 76"); [Plaintiffs'] Supplemental Appendix ("R. 92"); Appendix of Exhibits in Support of Defendants' [Second] Motion for Summary Judgment ("R. 137").

slob," demonstrated her disrespect for Waters through negative body language, comments and expressions, and disobeyed her superiors. (R. 72, Osmon Dep. 11/17/87, pp. 16-17, 20-23). This nurse reported Churchill's behavior to defendant Kathleen Davis ("Davis"), the Hospital's vice president of nursing. (*Id.*, pp. 47, 52-53).[6] Nurse Mary Lou Ballew ("Ballew") testified that Churchill told her that Churchill "didn't want to have [Waters's] name said in her presence." (R. 72, Ballew Dep. 8/27/87, p. 91).[7]

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[6] Churchill does not (and cannot) deny that this nurse reported Churchill's behavior to Davis; she disputes that it occurred, but does not say why the nurse would have lied about her.

[7] Churchill's insubordination began in 1986 after she developed a close personal relationship with Dr. Thomas Koch ("Koch"), the clinical head of the OB Department. (R. 76: Hopper Dep. 1/8/88, p. 75; Waters Dep. 11/18/87, pp. 208-09; Davis Dep. 8/27/87, p. 129; Lefler Dep. 11/7/89, pp. 27-29, 43-44; R. 92: Auten Dep. 10/12/88, p. 18; Beck Dep. 10/12/88, pp. 32-34; Horney Dep. 10/12/88, p. 19; Greene Dep. 10/13/88, p. 7; Mohr Dep. 10/13/88, pp. 22-23; Weis Dep. 10/17/85, pp. 39-40). Churchill and Koch subsequently married. (App. 4). Several of Churchill's fellow nurses reported to the Hospital administration that this social relationship with Koch contributed directly to Churchill's performance and attitude problems in the last months of her employment. (R. 76, Hopper Dep. 1/8/88, p. 75; R. 92: Beck Dep. 10/12/88, pp. 32-34; Mohr Dep. 10/13/88, pp. 22-23).

Waters counseled Churchill several times about the negative effect her relationship with Koch seemed to be having on her performance. (R. 76: Waters Dep. 11/18/87, pp. 141-42, 223-25; Waters Dep. 11/19/87, pp. 356-57; Churchill Dep. 10/4/88, pp. 76-78; Davis Dep. 8/27/87, pp. 129, 136, 225). Although Churchill alleges that defendants disliked Koch because of his criticism of nurse staffing policies, there is no record evidence to support this allegation. Instead, the record reveals that allegations of Koch's abusive behavior toward Hospital staff and patients

Churchill was counseled on several occasions regarding her negative behavior toward Waters. (R. 72: Waters Dep. 11/18/87, pp. 100-01, 109-16, 141-42; Waters Dep. 11/19/87, pp. 245-55, 280-85, 299-303, 381-82, 386-87). But Churchill's perceived behavior problems continued even after she received a written warning. The written warning followed other incidents of rude behavior and a specific confrontation between Churchill and Waters during an emergency Caesarean section ("C-section"). (R. 72: Haney Dep. 11/17/87, pp. 22-24, Ex. 1; Waters Dep. 11/19/87, pp. 280-85, 299-300). Churchill has admitted receiving the following warning after this incident:

> REASON FOR WARNING: (1) Insubordination – When had to be asked twice to leave the delivery area, you responded to me [Waters] in a very hostile manner, "I don't need you to tell me how to do my work." (2) General negative attitude and lack of support towards nursing administration in the OB Department.[8]
>
> WARNING GIVEN: Insubordination and/or lack of cooperation will not be tolerated in the future as it is very detrimental to the operations of the OB Department. Any future occurrence of this behavior will be subject to further disciplinary action which may include assignment to another nursing area *or discharge*.

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caused the Hospital administration concern. (R. 92, Supplemental Affidavit of Koch, Ex. 27).

[8] The warning about "[g]eneral negative attitude and lack of support" referred to a pattern of insubordinate behavior by Churchill toward Waters about which Waters already had counselled Churchill. (R. 76: Waters Dep. 11/19/87, pp. 356-57; Magin Dep. 11/20/87, pp. 124-26). Thus, the court of appeals erred when it stated that there was no evidence of an oral warning prior to this incident.

(R. 72, Churchill Dep. 10/4/88, Ex. 9) (the "Record of Warning") (emphasis added). Although both the warning form and Hospital procedures provided that Churchill could submit a written response, she chose not to do so, saying she did not wish to make "mountains out of molehills" and that she considered the complaint against her as "trite." (R. 72, Churchill Dep. 10/4/88, pp. 136-38). She also did not file a grievance protesting the warning.[9]

During the summer of 1986, Davis instituted a program of cross-training nurses. Under the program, nurses from other departments were trained in the work of busy departments like OB, in which they did not ordinarily work, so that they would be able to fill in when needed. (R. 72, Davis Dep. 8/27/87, pp. 24-27, 29).

There is no evidence that Waters and Churchill ever disagreed about implementation of cross-training. To the contrary, Churchill's deposition testimony reveals that her few exchanges with Waters about cross-training were low-key and amicable, and that Waters agreed with some of Churchill's points. (R. 76: Churchill Dep. 11/1/88, pp. 208, 211-20, 222-23, 225, 227; Churchill Dep. 3/2/89, pp. 385-88). Waters testified she did not even remember Churchill "particularly talking to me about it." (R. 76, Waters Dep. 11/18/87, p. 56). There was no "vocal criticism" (App. 3) by Churchill of cross-training or any annoyance or anger on Waters's part. (R. 76: Churchill Dep. 11/1/88, pp. 217-18, 222-23, 225; Churchill Dep. 3/2/89, pp. 385-86).

Churchill's experience was consistent with that of other nurses, most or all of whom voiced concerns about

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[9] Witnesses to the C-section incident differed as to whether Churchill's conduct during the operation itself was helpful or not. But it is undisputed that Churchill made the insubordinate comment to Waters that was the subject of the first part of the warning.

the cross-training program and none of whom was disciplined or chastised in any way. (R. 72: Welty Dep. 10/12/88, pp. 33-35, 54-57; Welty Dep. 4/6/89, pp. 205-07). Davis's unrefuted testimony was that she was "anxious" to hear about perceived problems with the cross-training program, so she could attempt to fix them. (R. 76, Davis Dep. 8/27/87, pp. 43-45, 49-50, 81).

The next written counseling Churchill received appeared in her annual evaluation dated January 5, 1987, in which Waters wrote:

> Cheryl exhibits negative behavior towards me and my leadership through her actions and body language, *i.e.* no answer, one word abrupt answers followed by turning and leaving, blank facial expressions, or disapproving facial expressions. This promotes an unpleasant atmosphere and hinders constructive communication and cooperation.

(R. 72, Churchill Dep. 3/2/89, Ex. 14). Once again, Churchill submitted no written response to this counseling, despite the fact that both the evaluation form (*id.*, final page) and Hospital policy permitted her to do so. (R. 72, Churchill Dep. 3/2/89, pp. 405-06).[10] Churchill testified that she did not write a response because she had nothing "earth shattering" to say and because she would have had to come in early to do so. (R. 72, Churchill Dep. 3/2/89, p. 404). She also did not file a grievance over the evaluation. Below, Churchill did not deny engaging in the conduct Waters described. (*Id.*, pp. 386, 405).

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[10] Churchill was well aware of her opportunity to submit a written response, since she had added comments to every one of her prior evaluations. (R. 72: Churchill Dep. 10/4/88, Evaluations of 11/4/83, 7/6/86, 5/13/85, 1/2/86, and 7/7/86).

B. Reports of Negative, Insubordinate Speech on January 16, 1987

On January 16, 1987, Melanie Perkins-Graham ("Graham"), a registered nurse, was assigned to the Hospital's OB Department as part of the cross-training program. The department had had staffing problems,[11] and defendants were trying to get nurses from other departments to transfer to OB. (R. 72: Davis Dep. 8/28/87, p. 50; Hopper Dep. 3/16/88, pp. 50, 52). During the 3:00 p.m. - 11:00 p.m. shift that day, Ballew, a registered nurse regularly assigned to the OB Department, overheard comments made by Churchill to Graham during a conversation in the Department's kitchen area. (R. 137, Ballew Dep. 8/27/87, pp. 94-95, 102, 109-10). At Ballew's deposition, Churchill's counsel accurately summarized some of what Ballew said she heard as follows:

> . . . You heard Cheryl say that Cindy was out to get Cheryl fired. You heard Cheryl say that Cindy had complained about treatment that Cheryl gave a patient which Cheryl denied but Cindy persisted in her accusation. You heard Cheryl say that she disapproved of the [OB Department's] check list. You heard Cheryl say that she always scheduled her own duty when three RNs were on board so that Cheryl would be less exposed to being called. You heard Cheryl complain that Cindy was not a good manager and didn't run the department well. . . .

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[11] This was a point on which Churchill, Koch and defendants *agreed*. Thus, there was no reason for defendants to be angry or upset when staffing problems were discussed (another false factual premise of Churchill's claims).

(R. 76, Ballew Dep. 8/27/87, pp. 111-12; *see also id.*, pp. 94-97, 102-03, 105-06; R. 76, Ballew Dep. 10/26/88, pp. 105-07).

Upset by what she heard, Ballew approached Waters on January 20, 1987, and informed her that "Cheryl took Melanie the cross-trainee into the kitchen for a period of at least 20 minutes to talk about you [Waters] and how bad things are in OB in general." (R. 72, Ballew Dep. 10/26/88, Ex. 2). Ballew construed those portions of the conversation she heard as "negative and intended to dampen the enthusiasm of" Graham, and she characterized the conversation this way when she reported it to Waters. (App. 56; R. 137, Ballew Dep. 8/27/88, pp. 110-11; *see also* R. 76, Ballew Dep. 10/26/87, p. 128).

Waters communicated Ballew's report to Vice President of Nursing Davis, and they decided to meet with Graham to investigate Churchill's behavior. (R. 72, Waters Dep. 11/19/87, pp. 441-43). On January 23, 1987, Waters and Davis met with Graham and her supervisor. (*Id.*, pp. 444-48). At this meeting, Graham reported that Churchill (1) "said unkind and inappropriate negative things about Cindy Waters"; (2) "had discussed her evaluation quite a bit"; (3) "stated that [Waters] had wanted to wipe the slate clean and have things get better but this wasn't possible"; (4) "stated that just in general things were not good in OB and hospital administration was responsible"; and (5) "stated that [Davis] was ruining MDH [the Hospital]." (R. 72, Waters Dep. 11/19/87, Ex. 7; *see also* R. 72: Davis Dep. 8/28/87, pp. 286-92; Graham Dep. 9/15/87, p. 82). In the district court, Churchill conceded that Waters and Davis *never* were informed that Churchill had discussed cross-training with Graham. (R. 75, p. 89; App. 22 (noting that "Churchill *alleges* . . . they were unaware of the actual content of her January 16, 1987 conversation") (emphasis added)).

At her deposition, Graham confirmed the accuracy of Waters's and Davis's accounts of their interview with Graham. She also described Churchill's comments as follows: (1) "the overall message was not a positive one as far as her relationship with Cindy [Waters]"; (2) [Churchill] "shar[ed] with me about her evaluations with Cindy"; (3) "she told me that she and Cindy didn't get along"; (4) "Cheryl was telling me that Cindy had said that she thought they should wipe the slate clean and try to start anew and so forth and Cheryl said that she told her [Waters] that that wasn't possible"; (5) "[Waters] didn't do much"; (6) "the general gist . . . was negative feelings between Cheryl and [Waters]"; and (7) "[Davis] was going to ruin the hospital." (R. 72, Graham Dep. 9/15/87, pp. 47-48, 73-78).

On January 26, 1987, Waters continued the Hospital's investigation by again interviewing Ballew, who said that Churchill (1) "was knocking the department"; (2) stated that Waters "was trying to find reasons to fire her" and had continued to blame Churchill for a patient complaint that was not Churchill's fault; and (3) "was saying what a bad place [OB] is to work." Ballew assured Waters "she would be willing to swear this was all true." (R. 137, Ballew Dep. 8/27/87, pp. 94-95, 106-16, Ex. 2).

Based on the reports they received from Ballew and Graham, Waters and Davis believed that Churchill was continuing her insubordinate and negative behavior – about which she had received written counseling only two weeks before. (R. 72: Davis Dep. 8/28/87, pp. 284-85; Waters Dep. 11/19/87, pp. 436-37). In Davis's view, the comments Churchill was accused of making were "against everything we were striving for to make it an attractive place to work, getting people to want to work down there, so this was a very negative thing to happen at that particular time." (R. 72, Davis Dep. 8/28/87, p.

303). Waters saw the comments as yet another manifestation of Churchill's negative and insubordinate behavior – "the straw that broke the camel's back." (R. 72, Waters Dep. 11/19/87, pp. 435-37). Davis and Waters concluded that Churchill's continuing insubordination merited termination. (R. 72, Davis Dep. 8/28/87, pp. 284-85, 330-31).

Davis (who was in charge of the investigation at this point) testified that she did not talk to Churchill before coming to this conclusion because she "felt like [she] had enough information" after Graham confirmed Ballew's account of Churchill's comments and gave additional details of the conversation. (R. 76: Davis Dep. 8/28/87, p. 321; Davis Dep. 6/6/89, pp. 110-11). Davis "did not hear that anyone else was in the room" and so did not talk to Koch (who claimed at his deposition that he was present during the conversation) or nurse Jean Welty ("Welty") (who claimed at her deposition that she overheard Graham and Churchill talking). (R. 72, Davis Dep. 8/28/87, pp. 321-22). Both Graham and Ballew testified they did not remember Koch being present during the conversation. (R. 72: Graham Dep. 9/15/87, pp. 71-73; Graham Dep. 2/6/89, pp. 45-47; Ballew Dep. 8/27/87, pp. 99, 107-08; Ballew Dep. 10/26/88, pp. 132-33).

Waters and Davis met with Churchill on January 27, 1987.[12] According to Churchill, Waters and Davis told her

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[12] Before the meeting, Waters and Davis discussed the appropriate response to Churchill's apparent insubordination with Defendant Stephen Hopper ("Hopper"), the Hospital's president. (R. 72: Davis Dep. 8/28/87, pp. 302-03, 308-12; Waters Dep. 11/19/87, pp. 441, 449-57; Hopper Dep. 3/16/88, pp. 5-13, 26, 32-42). Although Hopper was consulted, he did not make the decision to terminate Churchill. (R. 72, Hopper Dep. 3/16/88, p. 37). Davis and Waters had the authority to make the termination decision (*id.*, pp. 34-35) although Churchill could appeal their decision to Hopper through the Hospital's grievance procedure. *See* discussion *infra*, p. 13.

they had decided to terminate her because of (1) her refusal to change her negative behavior despite being told several times that she must do so; and (2) "a conversation lasting fifteen to twenty minutes with a cross trainee who had been assigned to OB for a particular evening shift[, which] . . . was reported as being non-supportive of the department and of its administrative leadership." (R. 72, Churchill Dep. 3/2/89, pp. 405-06, Ex. 15).[13] Churchill did not address these charges but instead voiced complaints about the manner in which the OB Department was managed. (R. 72, Churchill Dep. 3/2/89, pp. 405-06, Ex. 15). Before the meeting was over, Bernice Magin ("Magin"), the Hospital's vice president of human resources, arrived. Churchill asked Magin if there was anything Churchill could do about the decision to terminate her. Magin referred Churchill to the Hospital's grievance procedure and "handed [her] a copy of that procedure from the Employee's Handbook." (*Id.*, p. 408, Ex. 15).

Churchill filed a grievance with Hopper regarding her complaint that she had been "unjustifiably discharged" and terminated "based on rumors and gossip." (*Id.*, Ex. 17). On February 6, 1987, Churchill met with Hopper and Magin to discuss her grievance. According to Churchill, Hopper asked her to discuss (1) her "first warning" regarding the C-section incident; (2) "the comments Cindy had written on my last evaluation"; and (3) "the incident regarding my talking about Cindy and Mrs. Davis, with negative overtones, one evening while working in OB with a cross-trainee working the same shift with me." (*Id.*, p. 418; App. 75-77).

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[13] Davis testified she did not mention Ballew by name because she feared "repercussions" from Koch against Ballew. (R. 76, Davis Dep. 8/28/87, p. 297).

Although Hopper never mentioned Graham or Ballew by name,[14] Churchill knew who he was talking about – she testified, "[Graham] was the only one I could think of that I had worked with in the recent past that might have been the person that they were referring to." (R. 76: Churchill Dep. 3/2/89, p. 412).[15] *Churchill did not tell Hopper and Magin that she had discussed the impact of cross-training on patient care or any related subject with Graham.* (R. 76: Hopper Notes of Meeting with Churchill; Magin Notes of Meeting with Churchill (Tabs 50, 51); *see also* App. 75-77; R. 72, Churchill Dep. 3/2/89, pp. 413-15).

As part of his own investigation of Churchill's grievance, Hopper reviewed Waters's and Davis's written reports of their conversations with Ballew and Graham and Churchill's Record of Warning and 1987 evaluation. (R. 72, Hopper Dep. 1/8/88, p. 143). Hopper also had Magin interview Ballew one more time after the grievance meeting with Churchill. (R. 72, Hopper Dep. 7/12/88, pp. 4, 6-9, Ex. 19). Ballew confirmed the substance of her report to Waters regarding Churchill's negative comments about Waters and Davis. (*Id.*). After reviewing the information available to him, Hopper

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[14] Hopper explained this as follows: "I had a concern that if I shared the name of the individual that reported her or that she spoke with that Dr. Koch would take it out on that employee or employees." (R. 76, Hopper Dep. 1/8/88, p. 154).

[15] Churchill testified as follows:

Q And you thought that at the time –

A Yes.

Q – of your discharge, that it was a conversation with Melanie Perkins Graham that was involved in your discharge?

A That was the only person that I remembered having any discussion with, the only cross trainee that I'd had any discussion with.

(R. 76, Churchill Dep. 3/2/89, p. 412).

decided not to overrule Davis's and Waters's decision to terminate Churchill's employment. His decision was based on Churchill's pattern of negative, insubordinate behavior, of which the comments reported by Ballew were the latest example. (R. 72: Churchill Dep. 3/2/89, Ex. 20; Hopper Dep. 1/8/88, pp. 24-31; Hopper Dep. 3/16/88, pp. 39-40, 43-63; Hopper Dep. 7/12/88, pp. 11-13).[16]

Hopper found Churchill's reported comments about Davis and Waters objectionable not only because of their negative, insubordinate content but also because Churchill was voicing complaints about her superiors during working hours to a fellow nurse who was being cross-trained. (R. 72: Hopper Dep. 1/8/88, pp. 156-59; Hopper Dep. 3/16/88, pp. 43-63). Hopper found it inappropriate that Churchill discussed with Graham purely "personal issues," such as Waters's counseling of Churchill regarding her treatment of a patient and regarding Churchill's negative attitude and behavior. (R. 72: Hopper Dep. 1/8/88, p. 161; Hopper Dep. 3/16/88, pp. 43, 59). Hopper also believed that Churchill was attempting to undermine Davis and interfere with Hospital operations by discouraging Graham from working in the very department in which she was training. (R. 72: Hopper Dep. 1/8/88, p. 158; Hopper Dep. 3/16/88, pp. 49-63). Hopper testified:

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[16] On February 12, 1987, Hopper sent Churchill a letter in which he stated:

> In view of the seriousness of the latest reported incident and the fact that you previously received a written warning on August 25, 1986, as well as continued written counselling on your January 5, 1987 performance appraisal, I find that the decision to terminate your employment at McDonough District Hospital was appropriate.
>
> (R. 72, Churchill Dep. 3/2/89, Ex. 20).

> I guess the context of the issue is what bothers me, that an employee was knocking his department in front of somebody that was brought down to cross train and become trained in that area, and I do have a problem with it and I think it is an area [in] which discipline would be appropriate.

(R. 72, Hopper Dep. 3/16/88, p. 63).

C. Decisions Below

Churchill claimed that Hopper, Davis and Waters all violated her First Amendment rights by allegedly terminating her in retaliation for her comments to Graham, which Churchill said constituted protected speech. (R. 146, Third Amended Complaint, Count I). She also claimed that the Hospital was liable for the alleged violation either because the individual defendants were acting pursuant to some unconstitutional policy of the Hospital or because Hopper was a "policymaker." (*Id.*, Count III, ¶ 19).

Defendants moved for summary judgment on the following grounds: (1) Churchill's statements to Graham (regardless of the version) did not constitute protected speech because Churchill was not seeking to enlighten Graham on issues of public concern but was simply airing her own personal disagreements with her superiors; (2) the Hospital's legitimate need to maintain discipline and harmony among co-workers outweighed Churchill's interest in making the comments she made to Graham; (3) the speech reported to defendants was unprotected as a matter of law, and defendants were unaware of any protected speech at the time they made the decision to terminate Churchill; (4) the individual defendants were immune from liability because their actions were not clearly proscribed by the law in effect at the time of

Churchill's termination, in light of the specific facts confronting them when they acted; and (5) the Hospital could not be held liable for any alleged constitutional violation because the individual defendants were not acting pursuant to any unconstitutional policy or custom of the Hospital.[17] The district court granted summary judgment on the first two grounds and did not reach the last three.[18] The court stated:

> . . . Even assuming that Churchill's statements to Perkins-Graham were the reason for her discharge, those statements (regardless of the version) were, as a matter of law, not protected speech, and therefore any termination in response to them does not violate Churchill's First Amendment rights. Moreover, even if Churchill's speech were protected, the balancing approach of *Pickering v. Board of Education*, 391 U.S. 563 (1968) favor [sic] upholding the Defendants' actions and denying Churchill's claims.

(App. 45).

The district court found that the content, form and context of Churchill's speech rendered them unprotected. (App. 47-48). "Churchill did not espouse her opinions to a public audience or to authorities with power to make changes in policy. Rather, Churchill was repining to a co-worker in a coffee-room atmosphere." (App. 47). The

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[17] Churchill filed a cross-motion for summary judgment, contending that defendants' alleged failure to properly investigate the actual content of her speech violated her right to due process under the First Amendment. The district court denied this motion, a decision affirmed by the Seventh Circuit. (App. 31, 28-29).

[18] The district court also dismissed (pursuant to Rule 12(b)(6)) Churchill's claim that her termination violated her right of "expressive association" with Koch. (App. 42-43). The Seventh Circuit affirmed this dismissal. (App. 10 n.6).

Court held that the context of Churchill's remarks ("a history of hostility" and "repeated in-fighting") made it "clear that Churchill's purpose or motive in making these statements to Perkins-Graham . . . was to air her own personal grievances . . . not to speak out on matters of public concern." (App. 48).

Applying the *Pickering* balancing approach, the court found that Churchill's comments were "inherently disruptive" to the Hospital's interest in maintaining discipline or harmony among co-workers and encouraging close and personal relationships between Churchill and her superiors. (App. 49).

The Seventh Circuit reversed, holding that "the district court inappropriately resolved material issues of fact against Churchill in holding that her speech was not a matter of public concern" and "was critical and disruptive of the hospital's interests." (App. 9, 15-19). The court went on to reach the issues not addressed by the district court. It held that defendants, including the individual defendants, could be held liable despite their lack of knowledge of Churchill's protected speech. The court stated:

> We hold that when a public employer fires an employee for engaging in speech, and that speech is *later* found to be protected under the First Amendment, the employer is liable for violating the employee's free-speech rights regardless of what the employer *knew* [emphasis in original] at the time of termination. If the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct, the employer runs the risk of eventually being required to remedy any wrongdoing *whether it was deliberate or accidental.*

(App. 25) (emphasis added unless otherwise noted).

The Seventh Circuit also rejected the individual defendants' claim of qualified immunity. The court held that "in 1987 the law was clear that the speech of public employees while at work was protected under the First Amendment if it was about matters of public concern" and that "it is immaterial that the defendants were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern." (App. 27).

SUMMARY OF ARGUMENT

Public workplaces are no less susceptible to the disharmony caused by insubordination than are their private counterparts. In *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court recognized the necessity of allowing public employers to eliminate such disharmony by removing employees guilty of insubordinate speech. Even when an employee's speech arguably includes matters of public concern protected by the First Amendment, a public employer is privileged to discharge the employee if her First Amendment rights are outweighed by "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150; *Pickering*, 391 U.S. at 568 (the "*Pickering* balance"). A public employer need not "tolerate action which he *reasonably believe[s]* would disrupt the office, undermine his authority, and destroy close working relationships." *Connick*, 461 U.S. at 154 (emphasis added).

While acknowledging these basic constitutional principles, the Seventh Circuit nevertheless held that a public employer which terminates an employee based on reports of unprotected, insubordinate speech may be held liable

for retaliatory discharge under the First Amendment if a jury later finds that the reports were incomplete or inaccurate and that the employee actually spoke on matters of public concern. Although it expressly rejected Churchill's claim of a right to due process under the First Amendment (App. 23, 24 n.9),[19] the court below nevertheless held that an employer unaware of protected speech because of "an inadequate investigation"[20] may be held liable for retaliatory discharge "regardless of what the employer *knew* at the time of termination" and even if its lack of knowledge was "accidental." (App. 25, 29) (emphasis in original).

I.

A. This unprecedented holding conflicts with this Court's requirement that protected speech be a "substantial" or "motivating" factor in the termination decision for a constitutional violation to be found. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). In *Mt. Healthy*, the Court relied on earlier decisions requiring proof of "discriminatory intent" in cases of unconstitutional discrimination based on race. *Id.* (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977), which cited *Washington v. Davis*, 426 U.S. 229 (1976)). There is no evidence that

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[19] In so doing, the court noted that in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court "did not establish any type of procedural protections and thus did not create a First Amendment due-process right." (App. 24 n.9).

[20] The court did not discuss how much investigation an employer need do to meet this requirement, and it did not identify the constitutional source of this requirement.

defendants *ever* were informed that Churchill had discussed issues of public concern with Graham. Thus, they could not have intended to retaliate against Churchill for her allegedly protected speech when they made the decision to terminate her. Defendants also could not have had the requisite unconstitutional intent because *Connick* expressly permits termination based on the type of speech reported to defendants.

The district court properly struck the *Pickering* balance in defendants' favor. Defendants reasonably believed that Churchill's reported comments were intended to sabotage their effort to get Graham interested in OB. They also concluded that Churchill's insubordinate behavior had created an irreparable rift between her and her supervisor in a department where such disharmony might endanger delivery of appropriate health care. The substantial interest of the Hospital in eliminating such threats to its operations outweighed Churchill's interest in expressing her dissatisfaction to Graham. Such expressions of discontent do not address issues of public concern and are unprotected under *Connick*.

B. This Court need not imply a "duty to investigate" under the First Amendment because *Mt. Healthy* provides all the protection public employees need. It does so by prohibiting adverse action in *retaliation for* the exercise of protected speech. If there is no such retaliatory motive, this "ends the constitutional inquiry." *Arlington Heights*, 429 U.S. at 270-71. *Connick* permits employers to act on their "reasonable beliefs." Before deciding to terminate Churchill, defendants spoke with Graham, who confirmed both the content and tone of Churchill's comments. Defendants interviewed Ballew twice before they made the initial decision to terminate Churchill and once after Churchill's grievance meeting with Hopper and Magin. There is no evidence defendants had any reason

to question Graham's or Ballew's credibility. In her meetings with Waters, Davis, Hopper and Magin, Churchill said nothing that was inconsistent with Ballew's and Graham's reports.[21] On this undisputed record, there is no basis on which to find "unreasonable" defendants' belief that Churchill had engaged in unprotected, insubordinate conduct.

II.

A. The individual defendants are immune from liability because in January 1987, when they acted, it was clearly established by *Connick* that insubordinate conduct like that reported by Ballew and Graham was not protected by the First Amendment and it was not clearly established that defendants had a duty to investigate beyond what they did here. The immunity of public officials from individual liability for alleged constitutional violations must be determined based on the "objective legal reasonableness" of their actions, "assessed in light of the legal rules that were 'clearly established' at the time [those actions were] taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). The holding here, which appears to run contrary to *Mt. Healthy* and every case on point, cannot be said to state law that was "clearly established" six years earlier when defendants acted.

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[21] Even if Churchill had been given full specifics as to the Graham conversation, and had made a complete denial, the problem would not have gone away. It would have been the word of two disinterested persons against Churchill's self- serving denial. On the facts here, discharge would still have been appropriate. A more exhaustive "investigation" was a false trail down which Churchill led the court of appeals.

B. The individual defendants also were immune because they "could have believed" that their actions were lawful based on the information they possessed at the time they acted, even if they were mistaken. *Hunter v. Bryant*, 112 S. Ct. 534, 536-37 (1991) (per curiam); *Anderson*, 483 U.S. at 641.

III.

A. The Hospital cannot be held liable for the "inadequate investigation" alleged by Churchill because such inadequacy would have been contrary to, not mandated by, Hospital policy. "[T]he hospital's policy *requires* supervisors to provide [employees] notice and an opportunity to present their case and discuss their point of view." (App. 72) (emphasis added).

B. Churchill claims that the Hospital is liable under Section 1983 because she was fired pursuant to a policy "requiring that all employees of the Hospital . . . who criticize Hospital policy, do so only by directing such criticism to supervisory personnel." (R. 146, pp. 6-7). There is no evidence of any such policy.

C. The Hospital cannot be held liable merely because Hopper approved the decision to terminate Churchill. Even if Hopper's approval of Churchill's termination somehow violated the First Amendment, this single act could not have constituted a new unconstitutional *policy*, given the Hospital's already existing policy and practice of encouraging, not punishing, expression of employee concerns. *See St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion).

ARGUMENT

I.

DEFENDANTS DID NOT VIOLATE THE CONSTITUTION WHEN THEY TERMINATED CHURCHILL BASED ON BELIEVABLE, SUBSTANTIATED REPORTS OF UNPROTECTED, INSUBORDINATE SPEECH

A. Churchill's Retaliatory Discharge Claim Fails Because There Is No Evidence That Any Protected Speech Was a "Substantial" or "Motivating" Factor in Her Termination.

1. Defendants Did Not Have the Retaliatory Intent Required by *Mt. Healthy*.

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court addressed the state-of-mind requirement applicable to First Amendment retaliatory discharge cases. *Id.* at 283-87.[22] In such cases, the plaintiff must "show that [her] conduct was constitutionally protected, and that this conduct was a 'substantial factor' – or to put it in other words, that it was a 'motivating factor' in the [employer's] decision" to terminate her. *Id.* at 287.

There is no evidence that defendants *ever* were informed that Churchill had discussed cross-training with Graham. Thus, defendants could not have been motivated by Churchill's allegedly protected speech when they made the decision to terminate her. In the Seventh Circuit's view, this undisputed fact is "immaterial" and defendants may be held liable if Churchill's speech eventually is found to have been protected

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[22] "[Section] 1983 . . . contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986).

"regardless of what [they] knew at the time of termination" and even if their alleged violation of Churchill's rights was "accidental." (App. 25, 29). This holding conflicts with *Mt. Healthy's* requirement that protected speech be a "substantial" or "motivating" factor in the termination decision for a constitutional violation to be found.

In *Mt. Healthy*, the Court relied on earlier decisions requiring proof of "discriminatory intent" in cases of unconstitutional discrimination based on race. 429 U.S. at 287 (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977), which cited *Washington v. Davis*, 426 U.S. 229 (1976)). Thus, the constitutional tort recognized in *Mt. Healthy* is an intentional one – the plaintiff must prove "that the defendant's *intent* . . . to violate the plaintiffs' constitutional rights was a substantial motivating factor in the employment decision." *Tanner v. McCall*, 625 F.2d 1183, 1192 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981) (citing *Mt. Healthy*, 429 U.S. at 287; *Washington*, 426 U.S. 229) (emphasis added).[23] Defendants could not have *intended* to punish Churchill for protected speech of which they were unaware. *See O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1369-70 (7th Cir.), *petition for cert. filed*, July 12, 1993.

The court of appeals apparently believed that a constitutional violation can be found here if the *effect* of defendants' action was to terminate Churchill because of her protected speech, even if that was not their intent. But this holding cannot be reconciled with the Court's

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[23] See *Bishop v. Wood*, 426 U.S. 341, 350 (1976) ("In the absence of any claim that the public employer was *motivated by* a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways.") (Emphasis added).

decisions in *Washington* and *Arlington Heights*. In both cases, the plaintiffs alleged that the defendants' actions denied them equal protection because they had the effect (but not the intent) of excluding them on the basis of their race. The Court rejected those claims, holding that a racially "discriminatory purpose" must be a "motivating factor" for the Constitution to be violated. *Arlington Heights*, 429 U.S. at 270-71; *Washington*, 426 U.S. at 239.[24]

The court of appeals' holding that defendants can be held liable under the First Amendment even if their lack of knowledge of Churchill's protected speech was "accidental" establishes a negligence standard which also runs afoul of this Court's precedents. Even if, as the Seventh Circuit incorrectly assumed, defendants did not take care to insure that their investigation was complete, their alleged negligence is not a cognizable claim under the First Amendment.

In *Daniels*, this Court held that mere negligence does not work a deprivation under the due process clause because the word "deprive" connotes more than a negligent act. 474 U.S. at 330 (citing Justice Powell's concurrence in *Parratt v. Taylor*, 451 U.S. 527, 548-49 (1981)).[25] In its First Amendment cases, this Court has proscribed

[24] The *Washington* Court relied on cases involving exclusion of blacks from juries, gerrymandering cases, and school desegregation cases, in all of which the Court found that there must be some "purpose" or "intent" to discriminate. *Id.* at 239-40 (citing *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205 (1973); *Alexander v. Louisiana*, 405 U.S. 625, 628-29 (1972); *Wright v. Rockefeller*, 376 U.S. 52 (1964); *Akins v. Texas*, 325 U.S. 398, 403-04 (1945)).

[25] "Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person," a failure which does not rise to the level of a constitutional violation. *Daniels*, 474 U.S. at 332.

adverse action taken *"by reason of"* or *"motivated"* by the "exercise of constitutionally protected First Amendment freedoms,"[26] *Mt. Healthy*, 429 U.S. at 283-84, 287, and the denial of benefits *"because of . . .* constitutionally protected speech or associations." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (emphasis added). Similarly, in *Board of Education v. Pico*, 457 U.S. 853 (1982), the Court held that removal of books from a library violated the First Amendment only if the defendants *"intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor[27] in [defendants'] decision." *Id.* at 871 (plurality opinion) (emphasis in original). Like the concept of "deprivation" under the due process clause, the language of these cases requires something more than a negligent act.

Churchill lost her job because Waters, Hopper and Davis believed Ballew's and Graham's reports that Churchill engaged in repeated unprotected insubordinate speech, the last incident of which came after written warnings that such conduct would not be tolerated. Churchill and the court of appeals speculate that defendants might not have believed the reports of the last

[26] In *Mt. Healthy*, the Court formulated its causation requirement after noting that "[i]n other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result *caused by* a constitutional violation and one not so caused." 429 U.S. at 286-87 (emphasis added) (citing *Parker v. North Carolina*, 397 U.S. 790, 796 (1970); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963); *Lyons v. Oklahoma*, 322 U.S. 596 (1944); *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

[27] "By 'decisive factor' we mean a 'substantial factor' in the absence of which the opposite decision would have been reached." *Id.* at 871 n.22 (citing *Mt. Healthy*, 429 U.S. at 287).

incident had they spoken to more persons. To hold defendants liable for what they *might have* believed based on what they *could have* done ignores this Court's instruction in its First Amendment and equal protection cases that defendants can be held liable only if they *intended* to violate the plaintiff's constitutional rights.

2. *Connick v. Myers* Expressly Permits Termination Based on the Type of Speech Reported by Ballew and Graham.

Defendants could not have had the requisite unconstitutional intent because this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), expressly *permits* termination based on the type of speech reported by Ballew and Graham. In *Connick*, this Court established a two-step analysis to resolve the tension between an employee's First Amendment rights and the right of public employers to control behavior and speech which might adversely affect their operations. 461 U.S. at 143-54. Under *Connick*, a court must first determine, as a matter of law, whether the employee's speech "addressed a matter of public concern." *Id.* at 147. The court must examine the content, form and context of the employee's speech "as revealed by the whole record." *Id.* at 147-48. If the court determines that the speech addressed a matter of public concern, the court must balance the employee's First Amendment rights against the "government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150 (citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)) (the "*Pickering* balance").

By allegedly engaging in protected speech, Churchill did not insulate herself from discipline or discharge for reasons unrelated to that speech. *See Mt. Healthy*, 429 U.S. at 285-87. Churchill conceded that under *Connick*, "speech

on matters of purely personal interest or for the purpose of advancing personal grievances and the like is not protected. Furthermore, *plaintiff has no doubt that the reports submitted by Ballew and Perkins-Graham to Waters and Davis could be construed in such a fashion.*" (R. 143, p. 19)(emphasis added). The uncontroverted evidence in this case establishes that defendants *did* construe the reports in such a fashion. By holding that defendants nevertheless can be held liable if their conclusions were wrong, the decision below conflicts with *Connick* and *Mt. Healthy* by imposing liability even when the employer has shown that it based the termination decision on conduct unprotected by the Constitution.

In *Connick*, the plaintiff circulated a questionnaire expressing concerns about office transfer policy, office morale, and the level of confidence in office supervisors. 461 U.S. at 141. In words equally applicable to Churchill's reported comments, the Court held that none of these topics was a matter of public concern because the questionnaire "*would convey no information* at all other than the fact that a single employee [was] upset with the status quo." *Id.* at 148 (emphasis added). The Court held that the questionnaire, like the comments reported by Ballew and Graham, could most accurately be characterized "as an employee grievance concerning internal office policy." *Id.* at 154. "[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149.

The unrefuted evidence below established that Ballew's and Graham's reports precipitated Churchill's discharge and that Defendants perceived those reports as expressions of Churchill's personal dissatisfaction rather than attempts to enlighten Graham on issues of public concern. "When an employee expression cannot be fairly considered as relating to any matter of political, social, or

other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146.[28] The judicial second-guessing engaged in by the Seventh Circuit ignored these well-settled principles.

3. The Hospital's Interests in Maintaining Discipline and Eliminating Disharmony Outweighed Churchill's Interest in Making Critical Comments to Graham.

Under *Connick*, a court must strike a balance between an employee's right to engage in protected speech and the employer's right to control the workplace. The court of appeals correctly noted that an employee's First Amendment rights may be outweighed by an employer's "need to maintain discipline or harmony among co-workers" or "need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence." (App. 16-17). *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570-73). Defendants had an important interest in encouraging employees like Graham to train in understaffed departments like OB. They also had an important interest in maintaining harmony and a close working relationship between supervisor Waters and nurse Churchill to ensure proper patient care in the OB Department. In striking its balance, the

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[28] "Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." *Id.* at 146-47 (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry*, 408 U.S. 593; *Bishop*, 426 U.S. at 349-50).

Seventh Circuit failed to weigh these legitimate concerns of the Hospital against Churchill's interest in making critical comments to Graham.

Ballew reported to defendants that Churchill was deliberately attempting to dampen the enthusiasm of Graham. Deliberate attempts to sabotage a public employer's programs are not protected by the First Amendment. The court of appeals said an issue of fact exists as to whether Churchill's comments actually *had* a negative effect on Graham.[29] But the actual effect on Graham is irrelevant. *Connick* permitted defendants to use their best judgment and act on their reasonable beliefs. 461 U.S. at 154.[30] If an employer has concluded that an employee's conduct threatens to "disrupt the [workplace], undermine his authority, and destroy close working relationships," the employer is privileged to terminate the employee *before* her conduct has an adverse effect on the employer's operations. *Id.* at 154.[31]

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[29] By questioning defendants' conclusions regarding the intent and effect of Churchill's comments, the court appears to have been sitting as a " 'super-personnel department that reexamine[d] [defendants'] business decision.' " *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988) (quoting *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987)). It substituted its business judgment for defendants'.

[30] In *Connick*, this Court rejected the approach adopted by the Seventh Circuit here. The Court held that the district court there was wrong to require the employer to "clearly demonstrate" that the plaintiff's speech "substantially interfered" with her official responsibilities. *Id.* at 150. Instead, this Court focused on the public officials' "judgment" and "reasonable belief" that the employee intended her speech as an act of insubordination, rather than an attempt to enlighten her colleagues on matters of public concern. *Id.* at 151, 154.

[31] "[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office

Waters testified that Churchill's reported comments were the "straw that broke the camel's back" as far as Waters was concerned. The reported comments, in the judgment of Waters and her superiors,[32] created an irreparable rift between Churchill and Waters which warranted Churchill's termination. This was especially true in light of Churchill's reported statement that an improvement in her relationship with Waters "wasn't possible." (R. 76, Graham Dep. 9/15/87, p. 74).[33]

In the OB Department, nurses work closely together under circumstances in which a lack of cooperation or disharmony could have an adverse effect on the health of a mother or her baby and on the efficient delivery of appropriate health care. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick*, 461 U.S. at 151-52. Once defendants reasonably believed that Churchill's observed and reported insubordination precluded the necessary cooperation, defendants were privileged to terminate Churchill's employment.

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and the destruction of working relationships is manifest before taking action." *Id.* at 151.

[32] This is the only judgment that matters under *Connick*. *See id.* at 154.

[33] In *Pickering*, the Court suggested that criticism of a superior might be unprotected if it seriously undermined the effectiveness of a working relationship. 391 U.S. at 570 n.3. *See also Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 n.3, 415 n.4 (1979).

4. The District Court Correctly Held That the Relevant Portions of Churchill's Speech Were Not Protected Because They Did Not Address Issues of Public Concern.

Much of the court of appeals' decision is based on a single incorrect premise; namely, that "there are genuine issues of material fact in dispute regarding the content of Churchill's speech." (App. 28). In order to remove any such issue of fact, defendants informed the district court that "[s]olely for purposes of their motion for summary judgment, defendants do not dispute that [cross-training and other staffing issues] may have been discussed" by Churchill during the January 16, 1987 conversation. (R. 81, p. 5).[34] In its order granting summary judgment, the district court made it clear that it was accepting Churchill's version of the conversation in question:

> [T]his Court now finds that no dispute of *material* [emphasis in original] fact exists and that summary judgment is appropriately entered in favor of the Defendants. Even assuming that Churchill's statements to Perkins-Graham were the reason for her discharge, those statements (*regardless of the version*) were, as a matter of law, not protected speech. . . .
> *No matter what alleged speech content is analyzed* (that allegedly stated by Churchill in the kitchen area of the OB department or that reported to the Defendants by Ballew and Perkins-Graham),

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[34] A substantial portion of the opinion below is devoted to the proposition that the impact of cross-training on patient care is an issue of public concern. Defendants never have contended otherwise. Once the Seventh Circuit made this point, it failed to discuss the equally well-settled proposition that comments such as those reported by Ballew and Graham do *not* address issues of public concern and are not protected by the First Amendment.

> such speech is not protected. *All of the versions of Churchill's statements* have a common denominator – all are indicative of an attempt to simply air personal grievances rather than to speak out on an issue of public concern.

(App. 45) (emphasis added unless otherwise indicated).

In rejecting this view, the court of appeals inexplicably assumed that only two, mutually exclusive versions of the conversation are possible and that a jury will have to decide between them. But the record evidence contradicts this assumption. Ballew admits she heard only a portion of the conversation, and Graham did not remember everything that was said. So it is possible that Churchill did discuss the impact of cross-training on patient care.[35] But she has never asserted that this was all she discussed. Churchill admits to a whole portion of the conversation that did not relate to cross-training or any other issue of public concern. Whether it was 50 seconds (as incorrectly asserted by Churchill) or much longer, it was this portion of the conversation that Ballew and Graham reported.

Churchill admits that she spoke about Waters and Davis during this portion of the conversation. (R. 76, Churchill Dep. 11/1/88, pp. 329-30). Churchill says Ballew got the tenor of these comments all wrong and that she was less critical of Waters and Davis personally than Ballew thought. But this makes no difference under *Connick*. The undisputed fact remains that at least *some* of Churchill's version of the conversation – the only portion reported by Ballew and Graham – did not address issues

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[35] By focusing only on this portion of Churchill's version of the conversation, the court of appeals ignored *Connick's* instruction that a court must examine the content, form and context "as revealed by the whole record." 461 U.S. at 147-48.

of public concern. Since there was no evidence defendants were motivated by anything other than Ballew's and Graham's reports, the court of appeals erred in finding a genuine issue of *material* fact as to the content of the conversation.

The Seventh Circuit also gave short shrift to the admitted context of the conversation. Graham herself was a cross-trainee, powerless to effect any change in hospital policy and as familiar as Churchill with the cross-training program. Based on these undisputed facts, the district court correctly found that even if Churchill did address cross-training, her purpose was not to enlighten Graham about the program but to air her own personal criticism. Graham perceived the break-room discussion as a "bitch session," and that is the context she communicated to Waters and Davis. While the impact of cross-training on patient care (in the abstract) would concern the public, its impact on the work routine of the two nurses would not and thus would not be protected under *Connick*. *See* 461 U.S. at 148 n.8.

The fact that Churchill was voicing her concerns to a trainee during working hours "support[ed] [defendants'] fears that the functioning of [the OB Department] was endangered" by Churchill's critical comments. *See id.* at 153. When, as here, "employee speech concerning [workplace] policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the [workplace]." *Id.*

As the district court correctly found, the recent history of disagreements between Waters and Churchill also was part of the relevant "context." In *Connick*, the appearance of the questionnaire immediately after a disagreement over the plaintiff's transfer was held to support the

employer's "judgment" and "reasonable belief" that circulation of the questionnaire was an act of insubordination. *Id.* at 151-54. Similarly, Churchill's recent history of disagreements with Waters, about which she had been counselled two weeks earlier (in the evaluation she discussed with Graham!), supported defendant's reasonable belief (and the district court's finding) that Churchill was not addressing matters of public concern when she made the comments overheard by Ballew.

B. Defendants Were Under No Constitutional Duty to Investigate More Than They Did.

1. This Court Need Not Imply a "Duty to Investigate" Under the First Amendment.

In *Connick*, this Court warned against attempts to "constitutionalize" everyday employee complaints concerning internal workplace policy. *Id.* at 154. It also cautioned against "intrusive oversight by the judiciary" of routine personnel decisions. *Id.* at 146-47. By creating a duty to investigate before an employer can react to believable, substantiated reports of insubordinate speech, the court of appeals has done precisely what the Court feared. Ironically, the court of appeals did so at the same time it *rejected* Churchill's claim of a right to due process under the First Amendment and held that "*Mt. Healthy* provides adequate safeguards." (App. 23).

Mt. Healthy does provide all the protection public employees need. It does so by prohibiting adverse action *in retaliation for* the exercise of protected speech. Thus, the employee who engages in protected speech can rest assured that he or she will not be discharged because of it without some remedy under Section 1983. She may fear that a co-worker will get her fired by falsely reporting that she has been insubordinate, which is exactly what

Churchill claimed in her state-court lawsuit against Ballew. (*See* Complaint in *Churchill v. Ballew*, No. 88-L-22 (Cir. Ct. McDonough County, August 16, 1988)). But protection against such tortious interference with employment by co-workers is to be found in state law, not the Constitution. As this Court held in *Arlington Heights*, a plaintiff's failure to prove "that discriminatory purpose was a motivating factor in the [defendant's] decision . . . *ends the constitutional inquiry*." 429 U.S. at 270-71 (emphasis added).

There is no basis in the Constitution to require public employers to continue to "investigate" once they reasonably believe reports of unprotected speech from disinterested employees with no apparent reason to lie. The court of appeals held that if a jury later finds such reports to be inaccurate, "the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental." (App. 25).[36] It is impossible to reconcile this rule of strict liability with the *Connick* Court's concern about allowing public employers sufficient latitude to manage their workplaces:

> "To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency."

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[36] It is not clear how believing your employees can constitute "wrongdoing" or how such "wrongdoing" could ever be "accidental."

461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell J. concurring)).

Given the adequate safeguards provided by *Mt. Healthy* and *Connick*, there is no need to imply a duty to investigate to protect the First Amendment rights of public employees.

2. Under *Connick*, a Public Employer Need Do Nothing More Than Is Necessary to Establish a "Reasonable Belief," a Standard Met by Defendants.

Connick expressly permits a public employer to discipline an employee for engaging in conduct which it "reasonably believe[s]" is unprotected by the First Amendment. By referring to the employer's *"reasonable* belief," the Court adequately defined the standard an employer must meet to justify such discipline. If the belief that conduct was unprotected is "reasonable," the constitutional inquiry ends because no impermissible motive can be found.

This is not a case in which defendants had no reasonable basis for believing that Churchill engaged in insubordinate, unprotected conduct. In the five months preceding her termination, Churchill had been warned twice about such conduct – warnings to which she offered no oral or written rebuttal. Before deciding to terminate Churchill, defendants spoke with Graham, who confirmed both the content and tone of Churchill's comments and gave even more detail about what Churchill had said. Defendants interviewed Ballew twice before they made the initial decision to terminate Churchill, and once after Churchill's grievance meeting with Hopper and Magin. There is no evidence defendants had any reason to question Graham's or Ballew's credibility. In the meetings with Waters, Davis, Hopper and Magin,

Churchill said nothing that was inconsistent with Ballew's and Graham's reports.[37] On this undisputed record, there is no basis on which to find "unreasonable" defendants' belief that Churchill had engaged in insubordinate conduct.

The court of appeals also incorrectly assumed that some further investigation would have made a difference here. Even if Churchill had been given full specifics as to the Graham conversation, and had made a complete denial, the problem would not have gone away. It would have been the word of two disinterested persons against Churchill's self-serving denial. On the facts here, discharge would still have been appropriate. A more exhaustive "investigation" was a false trail down which Churchill led the court of appeals.

In the Seventh Circuit's view, had defendants conducted more extensive interviews and *then* concluded that Churchill had been insubordinate, they would not be liable under the First Amendment, regardless of what Churchill actually said. (*See* App. 25). The court thus focused solely on the adequacy of an investigation nowhere required by the Constitution and ignored this Court's requirement of an unconstitutional motive and its instruction that public employers may act on their reasonable beliefs. The Seventh Circuit also suggested that a

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[37] The court of appeals suggested that the grievance meeting with Hopper was a "star-chamber proceeding" in which Churchill was not given an opportunity to discuss the Graham conversation. That suggestion is apparently based on a version of the meeting suggested by Churchill in her appellate brief but wholly unsupported by the record. *See* discussion *supra*, pp. 13-14. The Seventh Circuit also took defendants to task for not interviewing Welty or Koch. There was no evidence that Defendants ever were aware that either Welty or Koch was present during the conversation. *See* discussion *supra*, p. 12.

jury's belief as to what an employee said should control over what the employer reasonably believed. The court of appeals based these holdings solely on its reading of *Mt. Healthy*, which nowhere suggests that this form of second-guessing is appropriate (or even addresses the issues raised here beyond requiring an unconstitutional motive).

II.

THE INDIVIDUAL DEFENDANTS ARE IMMUNE FROM LIABILITY BECAUSE THEY DID NOT VIOLATE CONSTITUTIONAL PRINCIPLES THAT WERE CLEARLY ESTABLISHED IN LIGHT OF THEIR REASONABLE BELIEF AT THE TIME THEY ACTED

A. In January 1987, It Was Clearly Established That the Conduct Reported by Ballew and Graham Was Not Protected by the First Amendment and It Was Not Clearly Established that Defendants Had a Duty to Investigate Beyond What They Did Here.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court held that the immunity of public officials from individual liability for alleged constitutional violations must be determined based on the "objective legal reasonableness" of their actions, "assessed in light of the legal rules that were 'clearly established' at the time [those actions were] taken." *Id.* at 639 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). The holding below, which appears to run contrary to *Mt. Healthy* and every case on point, cannot be said to state law that was "clearly established" six years earlier when defendants acted. To be sure, as the Seventh Circuit held, "the right to speak out on matters of public concern was established long before 1987." (App. 29). But in framing the issue as broadly as it did, the court ignored this Court's instruction that the right to be protected cannot be identified at a

"level of generality" which "bear[s] no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson*, 483 U.S. at 639.

Here, the issue properly framed was whether it was "clearly established" under *Mt. Healthy*, *Connick* and their Seventh Circuit progeny that defendants could not act based on Ballew's and Graham's reports, which stood uncontradicted by Churchill despite Hopper's request that she discuss (in Churchill's words) "the incident regarding [Churchill] talking about [Waters] and Mrs. Davis, with negative overtones one evening while working in OB with a cross-trainee working the same shift with me." (App. 75). In holding that defendants did not do enough to find out what Churchill said, the court below cited no precedent other than *Mt. Healthy*, which the Seventh Circuit acknowledged *does not address any duty to investigate*. (App. 23). As this Court has held, the lack of any relevant precedent alone undercuts any assertion that the duty described by the Seventh Circuit was "clearly established." *Procunier v. Navarette*, 434 U.S. 555, 563-64 (1978). Here, defendants "could not reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Id.* at 565.

As the district court correctly held,[38] the clearly established law at the time of Churchill's termination was that Churchill *could* be discharged for comments made to a co-worker if those comments were designed not to inform on matters of public concern but to complain about personal disagreements with her superiors. At the

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[38] Indeed, in order to deny the individual defendants' qualified immunity defense, this Court would have to find that laypersons Hopper, Davis and Waters should have reached a different conclusion as to their rights and obligations under the applicable law than did an experienced district court judge after full briefing by the parties.

time of Churchill's termination, Defendants were confronted with no fact indicating that Churchill was seeking to enlighten Graham on issues of public concern. Rather, Defendants knew only that Churchill had engaged in the type of "complaints over internal office affairs" consistently held unprotected by this Court and the court of appeals.

In cases decided before January 1987 (the relevant period for qualified immunity analysis), the Seventh Circuit emphasized that public employee speech is protected only when the "*point* of the speech" is to "raise . . . issues of public concern, because they are of public concern." *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (emphasis in original). The court consistently refused protection to employee comments regarding matters arguably of public concern when those comments were designed not to inform but to complain. *See, e.g., Zaky v. United States Veterans Admin.*, 793 F.2d 832, 839 (7th Cir.), *cert. denied*, 479 U.S. 937 (1986); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1257 (7th Cir. 1985); *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984); *Ekanem v. Health & Hosp. Corp.*, 724 F.2d 563, 570-71 (7th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984). At the time defendants acted, it was clearly established in the Seventh Circuit that speech is *not* protected when its focus is to air a personal feeling or express *personal disagreement* with a public employer's policies. *Zaky*, 793 F.2d at 839; *Patkus*, 769 F.2d at 1257; *Yoggerst*, 739 F.2d at 296.

At the time defendants acted, it also was well-established that they could terminate Churchill if their interest in efficient operation of the Hospital outweighed Churchill's interest in expressing her dissatisfaction to Graham. Defendants reasonably believed that the remarks reported to them had been intended to discourage Graham and had destroyed the working relationship

between Churchill and Waters. Prior to this case, the Seventh Circuit had held that in such situations:

> [Q]ualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required.
>
> . . . [T]he particularized balancing required by *Pickering* is difficult even for the judiciary to accomplish. Therefore, while it may have been clear since 1968 that a citizen does not forfeit his First Amendment rights entirely when he becomes a public employee, the scope of those rights in any given factual situation has not been well defined.

Benson v. Allphin, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986).

For public officials to be liable personally, the law must clearly proscribe the allegedly unconstitutional conduct and the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). This Court has declined to adopt any bright-line rule defining the "contours" of a public employee's right to make comments such as Churchill's. In *Connick*, the Court stated:

> "Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."

Connick, supra, 461 U.S. at 154 (quoting *Pickering*, 391 U.S. at 569). Given the absence of such a general standard, and the wealth of cases holding unprotected the type of personal griping reported by Ballew and Graham, this

Court's qualified immunity cases preclude individual liability on the undisputed facts here.

B. Qualified Immunity Protects Defendants from Individual Liability If They "Could Have Believed" Their Actions Were Lawful Based on the Information They Possessed, Even If They Were Mistaken.

The holding below also appears to conflict with the well-settled principle that the "objective legal reasonableness" of a public official's actions must be evaluated based on the information possessed by the public official at the time he or she acted. *Anderson*, 483 U.S. at 641. At the time of Churchill's discharge, there was nothing to put defendants on notice that Ballew's and Graham's reports might be inaccurate or that Churchill's speech was intended to enlighten Graham on issues of public concern. If, based on the information in the reports, a reasonable public official *"could have believed"*[39] that Churchill's speech was unprotected under *Connick*, or that the hospital's interest in maintaining harmony among its employees outweighed any First Amendment right of Churchill under *Pickering*, then the individual defendants were entitled to immunity even if they were "mistaken." 483 U.S. at 641. "[T]he court should ask whether the [officials] acted reasonably under settled law in the circumstances, not whether another reasonable, or

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[39] In *Anderson*, this Court held that an individual defendant's *actual* belief is irrelevant to the qualified immunity analysis. *Id.* In the district court, Churchill conceded that "the reports submitted by Ballew and Perkins-Graham to Waters and Davis *could be construed* [as unprotected]." (R. 143, p. 19) (emphasis added).

more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991)(per curiam).

The Seventh Circuit held defendants to a duty to investigate never discussed, let alone clearly established, prior to this case. Then it concluded that the individual defendants "will be liable for damages for retaliatory discharge" if the jury believes Churchill, regardless of what defendants reasonably could have believed at the time of their decision. (App. 29.)[40] This unprecedented, narrow view of qualified immunity would subject public officials to individual liability *despite* the "objective legal

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[40] The Seventh Circuit did not follow its own holding in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992). In *Elliott*, the plaintiff was transferred after her employer received reports that her inability to get along with her supervisor undermined productivity in her department. *Id.* at 341, 343. The plaintiff claimed that the true motive for her transfer was her protected speech concerning a conflict of interest by the supervisor, but (like Churchill) she did not deny that the defendants had received reports of dissension in her department. *Id.* at 343. The Seventh Circuit held that the defendants were entitled to summary judgment on qualified immunity grounds because they acted on the basis of the reports. The court stated:

> [T]he question is not what the conditions in the [department] *were*; it is what the administrators reasonably believed them to have been. [Citations omitted]. *Objectively reasonable but mistaken conclusions do not violate the Constitution. If we assume that the staffers [who made the reports] were lying, this does not establish that the administrators' actions were unreasonable, given the information in their possession.* Conditions in the [department] are not relevant; *the inquiry must focus on what the defendants knew*, and whether reasonable persons in their position would have believed their actions proper given the state of the law in 1987.

Id. at 343-44 (emphasis added).

reasonableness" of their actions. When public officials' own personal assets are at stake, they need qualified immunity "to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow*, 457 U.S. at 806. Qualified immunity is designed to balance the right of citizens to collect damages for unconstitutional conduct against the need to encourage public officials in " 'the vigorous exercise of official authority.' " *Id.* at 807 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). The Seventh Circuit placed no weight on one side of the scale.

III.

THE HOSPITAL CANNOT BE HELD LIABLE BECAUSE THE CONSTITUTIONAL VIOLATION ALLEGED BY CHURCHILL WOULD HAVE BEEN CONTRARY TO, NOT MANDATED BY, HOSPITAL POLICY

A. The Hospital Had No Policy of Conducting "Inadequate Investigations"

If the Court holds that a constitutional violation occurred here, the Court may reach the question of the Hospital's liability for the violation. The Hospital can be held liable only if Churchill can prove that the individual defendants were acting pursuant to some official policy or custom of the Hospital. *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 690-91 (1978). In order to prevail against the Hospital on her claim that there was an "inadequate investigation," Churchill would have to prove that the Hospital had a policy of making termination decisions without allowing employees to state their version of events.

As the district court correctly found in disposing of Churchill's due process claim, "the hospital's policy *requires* supervisors to provide [employees] notice and an

opportunity to present their case and discuss their point of view." (App. 72) (emphasis added). Since the Hospital's policy provided for the procedures the court of appeals (erroneously) found lacking, Churchill cannot be heard to claim (and did not claim) that the Hospital had a policy of conducting inadequate investigations.

B. The Hospital Had No Policy of Terminating Employees Who Criticized Hospital Policy.

Churchill claims that the Hospital is liable under Section 1983 because she was fired pursuant to a policy "requiring that all employees of the Hospital . . . who criticize Hospital policy, do so only by directing such criticism to supervisory personnel." (R. 146, pp. 6-7).[41] The court of appeals noted in a footnote that it was unable to determine the actual Hospital policy because of conflicting evidence. (App. 27 n.11). But the evidence cited by the court does not support the existence of the policy alleged by Churchill.

The Hospital's employee handbook set forth the Hospital's policy regarding employee speech. The handbook stated that one of the Hospital's "Human Resources objectives" was to "assure employees of their right to freely discuss with supervision any matter concerning their own or the Hospital's welfare." (R. 72, Complaint Ex. B, Employee Handbook). Churchill attempts to twist this pro-speech policy into one restricting speech by reading it as if it said "freely discuss *only* with supervision." There is no evidence that the Hospital ever read its policy

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[41] In *Pickering*, the Court suggested that such a policy might be constitutional. 391 U.S. at 572 n.4.

this way.[42] Comments of the type Churchill claims to have made about the Hospital's cross-training program were frequently voiced by other employees. The Hospital took no adverse action against any of these employees.[43]

Churchill also cited excerpts from the depositions of Magin and Hopper in support of her "supervisors only" policy claim. But Magin's comments indicate only that Hospital managers, like managers everywhere, might become upset if employees went over their heads or criticized them personally behind their backs. (R. 143, Magin Dep. 11/20/87, pp. 71, 79-80). The First Amendment does not proscribe such a natural human reaction. It proscribes only *retaliation* based on protected speech, and there was none here. As for Hopper's comment that Churchill's statements to Graham were made in a "wrong forum," Hopper was merely suggesting that Churchill was making negative comments to a cross-trainee whom she should have been encouraging to work in the OB Department.[44] He was not saying that the Hospital prohibited employees from discussing policies with their co-workers – something which the record reveals occurred frequently with the full support of Hospital administrators.

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[42] It is common for employers to have "open door" policies encouraging employees to bring problems to the attention of supervisors or management, so that the problems can be corrected. (*See e.g.*, A.B. Hartstein, *Employer's Guide to Auditing Personnel and Employment Practices*, pp. 5.61-5.62 (1988) (R. 136, Defendant's Memorandum in Support of Summary Judgment, Attachment).

[43] *See* discussion *supra*, pp. 7-8.

[44] *See* discussion *supra*, pp. 15-16.

C. The Hospital Cannot Be Held Liable Merely Because Hopper Approved the Decision to Terminate Churchill.

The court of appeals also stated that the Hospital might be liable for any violation by Hopper because under the Hospital by-laws, he had the "responsibility of 'developing and maintaining . . . personnel policies.' " (App. 27 n.11). In so doing, the court cut short the appropriate analysis under this Court's municipal liability decisions, and thus came to an erroneous conclusion.

The identification of those officials whose decisions represent the official policy of a municipality is "a question of *state law*." *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989) (citing *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion)) (emphasis in original). Once such officials have been identified, "it is for the jury [or the judge on summary judgment] to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . . or by acquiescence in a longstanding practice or custom." *Id.* (emphasis in original).

Here, as a matter of law, the Hospital's board of directors was the sole governmental body responsible for *setting* Hospital policy. *See* Ill. Rev. Stat. ch. 23, ¶ 1264 (1987) ("The board of directors of a District shall possess and exercise all of its legislative and executive powers"). Although the board could delegate its executive or ministerial duties to Hopper (*see id.*, ¶ 1267), it could not and did not delegate its legislative duties, *i.e.*, its authority to set Hospital policy. The policies "developed and maintained" by Hopper still had to be approved by the board.

There is no evidence that the board adopted any policy "which affirmatively command[ed] that [Churchill's termination] occur." *Jett*, 491 U.S. at 737. Nor is there any evidence that the board acquiesced in any longstanding custom or practice of Hospital administrators terminating employees for exercising First Amendment rights.

Id. To the contrary, the employee handbook (which stated official Hospital policy regarding such matters) encouraged employees to express their concerns, and none of the many employees who discussed cross-training was disciplined in any way.[45] Even if, as Churchill alleges, Hopper's approval of her termination violated the Hospital's policy and practice of encouraging speech, this single act would not have constituted a new policy. "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Praprotnik*, 485 U.S. at 127; *see also Auriemma v. Rice*, 957 F.2d 397, 400-01 (7th Cir. 1992) (executive does not set policy each time he makes a decision).

Accordingly, the Hospital cannot be held liable solely because Hopper approved Churchill's termination.

CONCLUSION

For all the foregoing reasons, Petitioners request that this Court reverse the judgment of the court of appeals.

Respectfully submitted,

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August 19, 1993

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[45] *See* discussion *supra*, pp. 7-8, 47-48.

(8)

No. 92-1450

In The

Supreme Court of the United States

October Term, 1993

CYNTHIA WATERS, et al.,

Petitioners,

v.

CHERYL R. CHURCHILL, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does a public employer who terminates an employee motivated by reports of speech denoting criticism of the employer's policies which reports, the employer has no reason to disbelieve, refer to protected speech on matters of public concern, violate the First Amendment if the employer claims he didn't know the exact content of the speech and thereby chose to regard it as private and unprotected when the employee can make a substantial showing the speech was protected as being on a matter of public concern?

2. Is a public employer who terminates an employee motivated by reports of speech denoting criticism of the employer's policies which reports, the employer has no reason to disbelieve, refer to protected speech on matters of public concern, entitled to qualified immunity from the employee's claim that the employer's actions violated the employee's First Amendment rights if the employer claims that because he did not know the exact content of the speech, he chose to regard it as private and unprotected where the employee can make a substantial showing it was protected as being on a matter of public concern?

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STATEMENT OF THE CASE

Respondent Cheryl Churchill brought this action against Petitioners Cynthia Waters, Kathleen Davis, Stephen Hopper and McDonough District Hospital pursuant to 42 U.S.C. § 1983 alleging she had been discharged in violation of her right to speak on matters of public concern secured by the First and Fourteenth Amendments.* The facts bearing upon her claim are as follows, taking all inferences in favor of Respondent as appropriate on summary judgment:

A. The Cross-Training Policy

McDonough District Hospital (MDH) is located in Macomb, Illinois and is, under Illinois law, a municipal corporation. 70 ILCS § 910/15. Dr. Thomas Koch has been the clinical head of the MDH Obstetrics (OB) Department since 1980.[1] R.76D, T.19, pp 71-72; SR, Ex.A, p.4. As the head of OB, Dr. Koch has the legal obligation to ensure appropriate delivery of medical care and has always insisted on maintaining adequate nurse staffing levels.

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* The statement of the case is based on the Record developed in the district court by reference to the district court document number plus the tab number plus the appropriate page number, e.g. R.76B, T. ___, P. ___. References are omitted to the court of appeals volume numbers 1-9. In addition, there are some references to a Supplemental Record (SR) followed by an appropriate tab (T) and page (p) designation. Sometimes, instead of reference to a tab or page number following the document number, reference will be made to an exhibit (Ex) or other identifying designation.

[1] OB had both a clinical and an administrative head. R.76C, T.12, p.90; R.50; R.142, Ex.A; R.76A, T.4, pp 87-88; R.76E, T.24, p. 207. The clinical head was a doctor who was responsible for the quality of medical care performed by the department. *Id.* The administrative head was the doctor responsible for the credentialing of the doctors with staff privileges in the medical specialty. SR, Ex.A, pp 1-2.

R.76C, T.12, p. 90; R.50, Bylaws, pp 13-14; R.142, Ex.A; R.76A, T.4, pp 87-88; R.76E, T.24, p. 207; R.76D, T.13, pp 9-10. Respondent Cheryl Churchill was a registered nurse in OB from 1982 until her discharge in 1987. *Passim.*

In April, 1986, Petitioner Kathleen Davis became the vice president for nursing and implemented a new hospital-wide nurse staffing policy called cross-training. R.76A, T.4, pp 24-31, 40-45.[2] Petitioner Cynthia Waters was the OB nurse department head responsible for implementing that new policy in OB. *Id.* at 38. Dr. Koch opposed cross-training and Churchill and others joined him in that opposition because they believed the new policy impaired nurse staffing adequacy. *Id.*, 49-50, 81-82; R.76D, T.18, pp 301-344. OB nursing is one of the highly specialized nursing fields. R.76A, T.4, pp 30-31. Dr. Koch, Churchill and others were concerned that there was no systematic effort to train the non-OB nurses to work effectively in OB.[3] R.76E, T.24, pp 45-47; R.76D, T.18, pp 301-344; R.76D, T.19, pp 116-122; R.76C, T.12, pp 107-110. Rather, nurses from less specialized departments were irregularly sent to "train" in OB by following the OB nurses through their rounds. *Id.* Koch and Churchill believed that the OB nurses were diverted from giving appropriate attention to the patients by the obligation to "train" the cross-trainees. *Id.* Koch and Churchill also felt

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[2] Davis also brought a hospital management philosophy which asserted that nurse employees of the hospital were obliged to obey their hospital superiors even in the face of legitimate contrary physician directions respecting specific patient care. R.76A, T.5, pp 187-191. See p. 4, *infra*.

[3] Davis felt that OB was the second most specialized department behind the operating room (OR) followed by the Intensive Care Unit (ICU). R.76A, T.4, pp 30-31. The remaining departments, the medical floor, the surgical floor, emergency room (ER) involved less specialized nursing skills. *Id.* Davis said she could not cross-train in OR because of its high degree of specialization. *Id.*

the nurses' obligations to their patients precluded them from giving meaningful training to the cross-trainees. *Id.*[4]

Because Koch and Churchill insisted on adequate nurse staffing levels, both were under scrutiny by the MDH administration beginning the late summer of 1986. R.76A, T.3, pp 34-35, 46-47, 49, 51-55, 81-82, 97; R.76E, T.24, pp 110, 207, 210. MDH President Hopper maintained a file of criticisms that were compiled about Dr. Koch by Waters and Davis. R.76C, T.11, pp 107-108; R.76C, T.12, pp 41-54; R.76B, T.8, pp 256-260. Waters maintained a similar file on Churchill, R.76B, T.7. p. 127; T.8, p. 262, although, Waters agreed that Churchill had never been obstructionist in her opposition to cross-training. R.76B, T.7, pp 54-55.

B. The August 21, 1986 "Code Pink" And Application Of Davis' New Hospital Management Philosophy

MDH's anxiety over Koch and Churchill erupted into a campaign to dismiss both beginning August 21, 1986. R.76D, T.14, pp 110-137; R.76B, T.8, pp 256, 264-373; R.76C, T.12, pp 14-38, 94-114; R.76E, T.34-39; R.62; R.101; R.143, Ex.A, pp 1-5; R.123, Def. Ex.48. Early that day, Dr. Koch, performing an emergency caesarean section, ordered a "code pink" which required all available nursing and medical staff to report to the delivery room. *Id.* Dr. Koch directed Churchill to perform various tasks. R.76D, T.14, pp 110-137; R.76E, T.20, pp 186, 193.

Waters did not arrive at work until the "code pink" was underway. R.76D, T.14, pp 110-137, *Id.*; R.76B, T.8, pp

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[4] On July 29, 1986, there had been a meeting of the medical and nursing staffs of obstetrics. R.124, Dfdts' Ex.8, pp 83-88 (Churchill was not in attendance at this meeting as she was in California retrieving the personal effects of her son who had been killed that week in a traffic accident. R.76D, T.14, p. 132.) A portion of a colloquy between Dr. Koch and Kathy Davis reported in the minutes, R.123, Dfdts' Ex. 8, pp 85-86, of the meeting reflects the divergence of views.

264-271, 307, 328; R.76E, T.20, pp 184-241. Upon arriving, Waters "went in to take . . . control of . . . the delivery room." R.76A, T.5, p. 172-173. She ordered Churchill from the room to attend to a patient, R.76B, T.8, pp 281-294; R.76E, T.20, pp 192, 197, 201-226, although Churchill had already done so before the beginning of the "code pink", R.76D, T.14, p. 42; R.76E, T.20, pp 184-222; R.76B, T.8, pp 283-289. In addition, her order to Churchill, though consistent with the management philosophy of Davis, n.2, *supra*, conflicted with Dr. Koch's instructions to Churchill in the code pink. *Id.*; R.76A, T.5, pp 174-191; R.76B, T.8, pp 403-408. Nevertheless, Churchill obeyed Waters but told her she "didn't have to tell [Churchill] how to do her job." *Id.*; R.76D, T.14, p. 42.

Dr. Koch was furious at Waters for disrupting the procedure and ordering nurse personnel under his direction from the room. R.76B, T.8, pp 296, 312; R.76E, T.20, pp 220-224.[5] After the "code pink" procedure was successfully concluded, Koch told Waters he wanted to talk to her. *Id.*; R.76E, T.20, pp 226-227.

Waters asked Hopper to join the meeting. R.76B, T.8, p. 312; R.76C, T.12, pp 34-37; R.76E, T.36. Koch outlined his concerns respecting not just Waters' interference with his conduct of the "code pink" that morning, but the situation in OB generally. R.76E, T.36, T.20, pp 229-237. Hopper took notes.[6] R.76E, T.36. Dr. Koch also sent a

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[5] Illinois probably does not adhere to a strict "captain of the ship" theory of vicarious liability whereby a surgeon is responsible for the acts of all under his charge in the performance of a surgical procedure. See *Darling v. Charleston Community Hospital*, 211 N.E.2d 253, 257-258 (Ill. S.Ct., 1965); *Foster v. Englewood Hospital Association*, 313 N.E.2d 255, 259 (Ill.App.1st, 1974).

[6] According to Hopper's notes, Dr. Koch made the following points: "three other nurses" besides Churchill were "picked on by [Waters]"; "no progress on items" which had been previously discussed; a certain nurse was "a 'hazard' on the night shift"; not "appropriate to train three orientees at once";

letter on September 2 to Hopper further specifying his concerns about the August 21 code pink. R.76E, T.39. He requested that Hopper place a copy of the letter in Churchill's personnel file, R.76E, T.39, but Hopper refused to do that although commendations of an employee's performance customarily were placed in the employee's personnel file. R.76C, T.10, pp 110-136.

C. The Unsuccessful Secret Campaign To Deny Dr. Koch Reappointment To The Medical Staff

Hopper, Waters and Davis met the next day with Dr. Jack McPherson who was the medical administrative head of OB and responsible for deciding whether to recommend physicians for reappointment to the medical staff with OB privileges. R.76C, T.12, pp 24-39, 87-91, 94-107; R.76E, T.37; SR, Ex.A, pp 1-4. Instead of advising McPherson of Koch's concerns as Hopper had recorded them (n.6, *supra*), they told him that Koch was out of control and that Churchill was in alliance with him.[7] R.76C, T.12, pp 24-31, 87-89; R.76D, T.13, pp 53-74; R.76E, T.29, pp 38-43; R.76E, T.37; R.143, Ex.A, p. 2; R.76E, T.29, pp 19-20. They decided to talk to medical chief of staff and ex officio member of the medical staff credentials committee, Dr. Rodger Lefler, about keeping Koch from being reappointed to the medical staff for 1987 when the credentials committee met in November, 1986. *Id.*

Hopper and Waters met on August 25 with Lefler. R.76E, T.38; R.143, Ex.A, p.2; R.76C, T.11, p.134, T.12, pp

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"should not have people work at night who aren't ready to be there"; "want[ed] equal treatment for all people"; "d[idn't] like rotation in the nursery"; "want[ed] to make people working [in OB] happier"; felt that Waters should give "fair and consistent" "direction" to the staff and "if Cheryl [was] doing something wrong she (or anybody else) should be corrected".

[7] Petitioners attempted, during the first three years of this litigation, to conceal their campaign against Dr. Koch. R.62, 113. See order of June 22, 1990 compelling disclosure.

41-54, 100-114. Again, they did not report Dr. Koch's policy concerns as Hopper had recorded them on August 21, 1986 (n.6, *supra*). Instead, Waters resurrected a complaint against Dr. Koch dating back to 1982, when Koch had reported on a medical progress chart that inadequate nurse staffing was the reason for the near fatal birth of a baby.[8] R.76E, T.38; R.143, Ex.A, p.2; R.133, Ex.A, 9/8/82 entry; R.142, Ex.A. They also told Lefler that Dr. Koch cared only about "himself [and] Cheryl", *Id.*, even though Hopper had recorded on August 21 that Koch "wanted equal treatment for all people" and "if [Churchill] [was] doing something wrong, she should be corrected." R.76E, T.36.

The medical staff credentials committee met November 10, 1986, and admitted with full staff privileges for 1987 all doctors who had applied except Dr. Koch. R.123, Dfdts' Ex.48; SR, Ex.A. Koch's application was tabled on Dr. Lefler's motion made after representations by Hopper and McPherson. *Id.* Hopper volunteered to determine

[8] On September 8, 1982, Dr. Koch had a labor patient in OB and MDH administration had moved nursing staff from OB to another department. R.142, Ex.A. Dr. Koch feared that moving nursing staff from OB made the department less able to meet emergencies which developed. *Id.* That fear materialized when, because of another emergency, Koch's labor patient went unnoticed for 65 minutes during which the fetus was not getting sufficient oxygen. R.133, Ex.A, 9/8/82 entry; R.142, Ex.A. Koch was summoned and delivered the baby which was born dead. *Id.* He was able to revive the baby but it suffered mild retardation. *Id.* Koch noted the inadequate nurse coverage in a medical progress note. *Id.* Waters' anger that Koch made that notation manifested itself four years later on August 25, 1986 in the meeting with Dr. Lefler ("blamed 0/0 Apgar (no heartbeat, respiration or muscle tone) on low staffing in chart and had spoken to family"). R.143, Ex.A, pp 2-3 (R.76E, T.38 (as redacted)). The baby's parents sued MDH and Dr. Koch. R.142, Ex. A. The hospital paid a $200,000 settlement and Dr. Koch was exonerated of malpractice by a jury. *Id.*

from MDH lawyers what legal exposure anyone who recommended against Dr. Koch's reappointment might have. *Id.*

The hospital medical staff credentials committee met again on December 8, 1986, at which time Hopper and McPherson asked the committee itself to recommend against his reappointment in an effort to bypass the need for a recommendation from McPherson. SR, Ex.A.; R.123, Def. Exhibits, 49, 52. However, the chairman required McPherson to submit the prescribed recommendation form. *Id.* McPherson complied and recommended Koch's reappointment and Koch was reappointed for the 1987 calendar year.[9] *Id.*

D. Churchill's Employment History And The Campaign To Discharge Her

Churchill received standard to above standard employment evaluations through the evaluation period three weeks before her discharge. R.76E, T.33, *passim*. She had no disagreements with Waters which caused any strain in their relationship until the code pink incident. R.76D, T.14, pp 46, 136. Churchill never expressed any criticisms about Waters' performance as director except "as it pertained to patient care as a result of the cross-training policy." *Id.* at 79, 104-107; R.76D, T.18, p.239. When Churchill did express her concerns about staffing to Waters beginning in 1986, she did so in a "professional" manner. R.76D, T.14, p.79; R.76D, T.18, p. 222. Waters' usual reply was that she would "look into" Churchill's concerns. R.76D, T.14, p.82.

The only reprimand Churchill understood she received from Waters was the written warning on August 25, 1986, for saying "don't tell me how to do my job" in

[9] For the last two years Dr. Koch has served as the chief of the medical staff.

the August 21 code pink. (Pet App. 75).[10] Churchill said she said that in defense of her professional judgment, not intending to be insubordinate. R.76D, T.14, pp 123-136. Churchill said she "[did] not remember any comments regarding [the] general negative attitude" she was also charged with having. R.76D, T.14, p. 136-138; T.18, pp 169-174. Churchill disagreed with but did not protest the written warning. *Id.*

Waters' and Davis' evaluation of Churchill three weeks before her discharge credited her with a "standard performance" in "display[ing] a positive attitude toward the hospital and profession, accepting those things which cannot be changed, and constructively working to change those things which can and should be changed", and recommended her for a raise. R.76E, T.33; Evaluation 1/5/87, pp 1, 4. Their evaluation further credited Churchill with having corrected a problem they had noted six months earlier, viz., that she "need[ed] to work toward separating personal and professional matters while on duty", a reference to her relationship with Dr. Koch. Cf. *Id.* with *Id.*, T.33, Evaluation 7/7/86, p. 4; R.76A, T.5, p. 250.

At the conclusion of the printed form, Waters wrote by hand that she observed "negative behavior" on Churchill's part.[11] *Id.*, R.76E, T.33, 1-5-87 Evaluation p.5.

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[10] Petitioners gave the written warning to Churchill incident to their simultaneous decision on August 25 to attempt to deny Koch reappointment to the medical staff. R.76C, T.12, pp 52-54, R.76E, TT.34, 38; R.143, Ex.A, pp 2-3. A written warning was step two in a progressive discipline scheme consisting of first, a verbal counseling, second, a first written warning, third, a final written warning which [could] include suspension and last, discharge. R.76A, T.1, pp 36-39. However, Churchill never received a "verbal counseling" which she understood as a reprimand. R.76D, T.14, pp 77-79.

[11] The handwritten comments read in full: "Cheryl exhibits negative behavior towards me and my leadership – through her

Waters did not specify any incident. *Id.* When Churchill and Waters met on January 5 to discuss the evaluation, Waters "certainly did not" discuss with Churchill the handwritten allegation of "negative behavior." R.76E, T.23, pp 383-405. It was not unusual for Waters to write down different things from what she would say in the evaluation sessions. R.76E, T.24, P. 199. This time, however, Waters wrote the "negative behavior" remarks after consultation with Davis and Hopper for the purpose of recording a second written warning. R.76C, T.12, pp 11-14; R.76B, T.8, pp 391-402; R.76A, T.5, pp 247-265; R.76A, T.1, pp 36-38. They did not, however, put the "warning" in the form prescribed for the purpose of advising of a written warning. *Id.*; R.76B, T.8, pp 399-400.

E. The January 16, 1987 Dinner Conversation

On January 16, 1987, Churchill reported for work for her 3:00 to 11:00 shift. R.76D, T.18, pp 276-290; R.76E, T.24, pp 23-25, 33. Nurse Mary Lou Ballew[12] and cross-trainee, Melanie Perkins-Graham (Graham) were also assigned to that shift. R.76E, T.24, pp 23-27, 40; R.76E,

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actions and body language, i.e. no answer, one word abrupt answers followed by turning around and leaving, blank facial expressions or disapproving facial expressions. This promotes an unpleasant atmosphere and hinders constructive communication and cooperation." R.76E, T.33, Evaluation 1/5/87, p. 5.

[12] Ballew had been hired in August, 1986. R.76A, T.3, pp 18-23. She had just completed a 90 day probationary period. R.76E, T.24, p. 25. After the August 21, 1986, "code pink" C section in which she had been criticized by Koch, she had learned from Waters that Dr. Koch and Churchill were viewed in disfavor by the MDH administration. R.76A, T.3, pp 35, 45, 55, 97; R.76D, T.17, pp 94-101. After that date, Ballew reported several incidents concerning Dr. Koch to Waters. R.76A, T.3, p. 48; R.76D, T.17, pp 147-148. Waters turned Ballew's reports into Hopper and Hopper maintained them in his file on Koch. R.76C, T.11, pp 107-112, 130; R.92, Supp. App. Koch, Exhibits A & B.

T.24, pp 23-25; R.76D, T.19, pp 18-28. Ballew arrived for work at 5:00 p.m., two hours after the shift began. R.76D, T.17, pp 94-101.

At 5:00 p.m., as was customary, Churchill and Graham began to eat their dinner in a kitchen area situated behind but within earshot of the main nurses station. R.76D, T.18, pp 282-290; R.76E, T.24, pp 33-36. Jean Welty, the shift supervisor, having finished her dinner, was leaving to answer the phone announcing a new patient. *Id.* Ballew, having just arrived at work, was standing behind the main desk. *Id.*; R.76D, T.17, pp 94-96.[13] Dr. Koch arrived to do his customary rounds and then went into the kitchen area where Churchill and Graham were eating. R.76D, T.19, pp 18-20. Graham said she was glad it was not busy because it was difficult to crosstrain in OB. R.76D, T.18, pp 292-293, 300-301; T.19, pp 19-21; R.76E, T.24, pp 44-45.

With that statement, Churchill, Graham, and Koch began a general 20 minute discussion about the cross-training policy. R.76E; T.24, pp 33-57. Shift supervisor Welty, who was filling out a chart on the new patient at the desk immediately outside the door, listened "very closely" to the conversation because she was interested in how Graham, from a less specialized nursing floor, reacted to the policy. R.76E, T.24, p. 45.

Welty heard Dr. Koch express his views that cross-training's application in OB harmed patients and increased malpractice risks and costs. R.76E, T.24, pp 40-57. She heard Churchill agree and say that Davis' policy as it was being sporadically implemented was going to "ruin" the hospital. R.76E., T.24, p.47. At the end

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[13] Ballew could not see who was in the kitchen area but could hear voices through the open door. R.76D, T.17, pp 102-104. Prior to January 16, Ballew did not know Graham and had only an acquaintance with Churchill with whom she had never talked one-on-one. R.76A, T.3, pp 94-95; R.76D, T.17, pp 105, 124.

of the conversation, Welty heard Graham say she was considering transferring to OB but had heard bad things about Waters. R.76E, T.24, pp 48-49, 198. Welty heard Churchill encourage her to transfer to OB, saying that Cindy Waters had good intentions but was sometimes "moody" because her job "wears her down." *Id.*, p. 49.

Churchill, in her testimony about the dinner conversation, R.76D, T.18, pp 276-344, recalled saying that cross-training as a concept had merit if applied effectively. *Id.*, 301-306, 309. She said that to be effective, crosstraining had to be structured with the same people participating on a regular basis to achieve consistent and frequent exposure to OB. R.76D, T.18, p. 309. Churchill said cross-training was not fair to patients because when a nurse cared for a patient, the patient was entitled to assume that the nurse was knowledgeable, which was not the case if the nurse was a cross-trainee. R.76D, T.18, pp 305-307, 310-317. She also recalled saying that in an emergency situation, a cross-trainee would not be competent to handle emergencies, which was unfair to the patient. *Id.*

Churchill admitted she said that Davis' cross-training policy was going to "ruin the hospital" because it "impeded patient care." R.76D. T.18, pp 321, 322 (R.37, T.4), 324, 329, 330. She said that Davis and the administration were more concerned about marketing and business matters than the delivery of nursing services, and that Waters concurred with the administration. *Id.*, p. 324.

Churchill testified that at the end of the 20 minute conversation, Graham said she had heard that Waters was difficult but did not know her personally. R.76D, T.18, pp 332, 339. Churchill said she described the situation in her last evaluation when Waters had given her a good evaluation both on the form and verbally but had written inconsistent remarks at the end of the evaluation which had "confused" her. R.76D, T.18, p. 334. Beyond that, Churchill said that Waters should not be a problem because she worked the early shift, R.76D, T.18, p. 292. Churchill said

she made no remarks critical of Waters in a personal sense. R.76D, T.18, pp 339, 340, 342-343.

Dr. Koch corroborated Welty's and Churchill's recollection of what was said, R.76D, T.19, pp 18-22, 30-34, 39-41, 45-50, and agreed Churchill may have said Davis was going to "ruin the hospital," but it was expressive of the "concept [that] cross-training as it was being carried out . . . was dangerous to patients." R.76D, T.19, pp 18-20, 30-34, 3941, 45-50. Koch also recalled that Graham commented she had heard criticisms of Waters and he recalled that Churchill said Waters could be avoided. R.76D, T.19, pp 45, 47.

Ballew testified she was answering lights when the speech took place. R.76A, T.3, p. 102; R.76D, T.17, pp 102-111. She did not see who was in the kitchen area, just "hear[d] voices" and "snatches and pieces" of the conversation, *Id.*, to which she "wasn't paying . . . much attention." R.76D, T.17, p. 103-104. She began overhearing the conversation after it began and "[came] in in the middle of sentence[s]" and the conversation "[didn't] make any sense" to her. R.76D, T.17, p. 107

F. The Ballew And Graham Reports Of The Conversation

Four days later, Ballew orally advised Waters that she (i) "overheard something . . . which was not good and . . . should not be happening and [Ballew] [wanted] [Waters] to be aware of its happening," and (ii) that "[Churchill] took [Graham] . . . into the kitchen for a period of at least 20 minutes to talk about you and how bad things are in OB in general." R.76E, T.42.[14] She

[14] At page nine of their brief, Petitioners quote Churchill's "summary" of Ballew's deposition testimony as to what Ballew said she heard Churchill say. However, what Ballew testified she heard is not what she reported to Waters. R.76E, T.42. Moreover, Ballew appears to have confused things she thinks she heard during the January 16 speech with things Waters had told her about Churchill and Koch. R.76A, T.3, pp. 94-95. The only thing about which Ballew was ever clear was that Churchill never directed any comments to Ballew, just to a group of which Ballew was a part, sometime in "December, January, maybe." R.76A, T.3, pp. 94-95.

further advised Waters that the conversation was negative and had "dampened the enthusiasm" of Graham, although Ballew never talked to Graham about the conversation. R.76A, T.3, p. 105; R.76D, T.17, pp. 125-128. Waters admitted that Churchill's speech as reported by Ballew could have referred to criticism of the cross-training policy. R.76B, T.8, pp. 436, 444, 447-448; R.76A, T.5, p. 310.

Upon hearing Ballew's report, Waters advised Davis and Hopper. R.76A, T.5, pp. 311-312. The three of them decided on January 20, 1987 to fire Churchill if Graham confirmed the conversation as reported by Ballew. R.76A, T.5, pp. 312-313. No one considered giving Churchill an opportunity to respond. R.76A, T.5, pp. 291, 321.

On January 23, 1987, Davis and Waters met with Graham. R.76B, T.8, pp. 444-446; R.76A, T.5, pp. 286-292, 312-315; R.76E, T.43. They told her they wanted confirmation of whether Churchill had criticized the hospital. *Id.* Graham was "nervous", "frightened", "reluctant to talk", *Id.*; R.76A, T.5, pp. 311-314; R.76E, T.43, and could not remember the conversation "very specifically" but did recall that it took 20 minutes. *Id.* She agreed that Churchill had (i) said "unkind and inappropriate negative things about Cindy Waters"; (ii) said "that just in general things were not good in OB and hospital administration was responsible"; (iii) said that "Kathy [Davis] was ruining the hospital"; (iv) "discussed her evaluation and that Waters wanted to wipe the slate clean"; and (v) said that "Waters had knowledge of everything Churchill was saying because Churchill had said it directly to Waters." R.76E, T.43; R.76A, T.5, pp. 287-291, 311-314.

Neither Waters nor Davis asked Graham whether her enthusiasm had been "dampened" by the conversation and Graham did not say it had been. *Id.*; R.76A, T.5, pp. 296, 304. Graham testified she did not feel "OB [was] a bad place to work." R.76B, T.6, p. 88.

G. The Discharge of Churchill

Davis' understanding of the speech reported to her by Graham was

> "that Cheryl said Cindy was a poor manager. I was ruining the hospital. The department was run badly. Cindy treated [Churchill] very badly . . . [and] Cheryl talked about her evaluation."

R.76A, T.5, pp. 287-288. Davis acknowledged that "[she] [didn't] know if [Churchill] was talking about the cross-trainee program or staffing or what . . . " with reference to the statement that "[Waters] was a bad manager". *Id.* at p. 289. Davis further acknowledged that Graham did not "specify in what respects [Churchill] thought [Davis] [was] ruining the hospital." *Id.* Davis' "impression" was that Churchill and Graham were "speaking just generally . . . overall without any specifics." R.76A, T.5, p. 290.

On January 26, 1987, Hopper, Waters and Davis met and Davis and Waters advised that Graham confirmed Churchill's speech, R.76A, T.5, p. 320. The three of them decided to fire Churchill. R.76C, T.11, pp. 7-41. Waters and Davis met with Churchill on January 27, 1987 and fired her. R.76A, T.5, pp. 320, 329-334; R.76E, T.T.44, 45, p. 331. They told her she had been overheard speaking in "negative" terms about the department, but did not tell her with whom or when she was overheard or what she was supposed to have said. R.76A, T.5, p. 331; R.76E, T.28, pp. 21-29; T.T.44-45. They did not seek her version. *Id.* Davis said Ballew's and Graham's reports gave them "enough information" that it "would not have been productive to understand [Churchill's] version." R.76A, T.5, p. 321.

After Waters and Davis discharged Churchill, Churchill grieved to Hopper.[15] R.76E, T.49. As the final authority respecting hospital personnel matters, Hopper did not regard Churchill's discharge as final until he had acted on the grievance she filed. R.76A, T.2; R.76C, T.10, p. 33. Hopper conducted the grievance proceeding on February 6, 1986 and limited his consideration to the August 21 "code pink", the January 5 evaluation, and Churchill's January 16, 1987 conversation without advising her of the date or persons involved.[16] Pet. App. 75; R.76E, T.23, pp. 411-415. Churchill, thinking the conversation was one she remembered having about "cross-training", attempted to advise Hopper of the problem with cross-training. *Id.* Hopper, however, said "he didn't want to get into that. . . . " Pet. App. at 76.

Hopper decided to discharge Churchill on his understanding Churchill had (i) said "Kathy Davis was ruining the hospital"; (ii) said "things were not good in OB and

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[15] She initially directed a letter of grievance to the vice president of personnel, Bernice Magin. R.76E, T.47. Magin told her that she should direct her grievance to Hopper thereby bypassing Waters and Davis because her grievance involved Waters and Davis who, Churchill believed, had unfairly discharged her. R.76E, T.23, pp. 407-411. Neither Hopper nor Magin told her that Hopper had played an equal part with Davis and Waters in discharging Churchill. *Id.*

[16] Petitioners devote page 14 of their brief to suggesting that Churchill was, in fact, on notice as to when the subject conversation had taken place and to whom she had spoken. That is inaccurate. R.76E, T.23, pp. 411-412. See also statement of Vice President for Personnel Magin who attended the grievance proceeding at Hopper's request where Magin reports that Churchill said in response to Hopper's question as to whether Churchill had said the things she was reported to have said, "I do not know what evening she (Waters) is referring to and I don't know who was working." R.76E, T.51, p. 7. All she could remember was that one evening she had discussed cross-training with a cross-trainee. R.76E, T.23, pp. 411-415.

administration was responsible", and (iii) reported an "instance . . . where Churchill said [Waters] continued to pursue the matter of a patient complaint [against Churchill]." R.76C, T.10, pp. 156-157. Hopper said the statement that Davis was "ruining the hospital" was improper because "it undermine[d] the work that Davis is trying to do in the hospital." R.76C, T.10, p. 158. His basis for that conclusion was that "[he] [didn't] agree with the statement" and she "[was] voicing it to the wrong forum." *Id.* Hopper said she should have voiced it "to . . . Waters, . . . Davis, or [him]." *Id.*

Hopper testified he had "no reason to disbelieve" that Churchill's statements that Davis was "ruining the hospital" and "things were not good in OB and administration was responsible," referred to cross-training. R.76C, T.10, pp. 159-160. Hopper also said he had "no reason to disbelieve that any criticism that . . . Churchill may have leveled against Cindy Waters to the cross-trainee . . . related to the [cross-training program]." *Id.* at 162.

Jean Welty, the shift supervisor who heard all of Churchill's speech, testified that it did not disrupt anything. R.76E, T.24, pp. 52-53. Welty testified that she "would have liked to have been a participant" but had finished her dinner and "had other things . . . to do." *Id.*, p. 108. Welty also testified that Graham was "enthusiastic" at the end of the shift and said she would give "careful consideration" to transferring to OB. *Id.*, pp. 192-193. Most OB nurses had never heard of Churchill's conversation and none heard of any adverse effect it may have had. R.92 (All nurse depositions except Ballew).

SUMMARY OF THE ARGUMENT

A. The summary judgment record demonstrates petitioners were motivated by reports of Churchill's speech denoting criticism of Petitioners' policies. Petitioners claim they did not know the content of that speech and chose to construe it as private, insubordinate

speech and fired her. Churchill can show her speech was protected as being on a matter of public concern. Petitioners made no effort to regulate with precision speech alleged to be private and insubordinate. They, therefore, risked indiscriminately punishing protected speech under the guise of punishing alleged unprotected personal speech.

1. The court of appeals considered Churchill's speech in the context of a six month dispute between the hospital administration and the hospital's professional medical and nursing staffs. It considered that what Petitioners claimed were acts of Churchill's insubordinate behavior occurred before they gave her a final personnel employee evaluation showing her to be a conscientious and dutiful employee. The Court, therefore, concluded that Petitioners' claim that her speech was insubordinate and unprotected was pretext unless her speech, in fact, proved to be private and insubordinate.

2. The Petitioners made no reasonable effort to determine the actual content of Churchill's speech, the reports of which denoted critical speech on matters of public concern which they had "no reason to disbelieve" was protected. By failing to make any reasonable effort, the Petitioners acted deliberately indifferently and, therefore, at their risk in describing her speech as insubordinate and unprotected. An issue of fact, therefore, exists as to whether Petitioners were motivated by her protected speech to discharge her.

B. At the very least, the Petitioners, in making no attempt to ensure that her speech was unprotected before they discharged Churchill, risked punishing protected speech on matters of public concern indiscriminately with any unprotected speech as may have been involved. They employed no procedures or safeguards required by the First Amendment to ensure against indiscriminate prohibition of protected along with unprotected speech, particularly when the line between the two is "finely drawn." *Speiser v. Randall*, 357 U.S. 513 (1957). As such,

they created an unreasonable risk of infringing Churchill's right to speak on matters of public concern and the public's right to receive the benefit of that speech from the special knowledge possessed by public employees.

C. On the basis of the reports they received of Churchill's speech denoting criticism of the policies of Petitioners and the absence of any reason to disbelieve that the reports referred to protected speech on matters of public concern, Petitioners had no reasonable basis to conclude Churchill's speech was insubordinate. Accordingly, they had no reasonable basis to conclude that it did or could have had any forbidden adverse effect on Petitioners' discharge of the public function of the hospital. Accordingly, Petitioners are not entitled to any benefit from *Connick's* (*v. Myers*, 461 U.S. 138 (1983)) "reasonable apprehension" of disruption test.

D. It was clearly established in January, 1987, that a public employee had a right to give on-premises speech on her own time denoting and which the employer had no reason to disbelieve was on matters of public concern and which did not give any reasonable basis for believing would disrupt the function of the hospital. Accordingly, the individual Petitioners are not entitled to qualified immunity from Churchill's suit alleging deprivation of her rights as a public employee to speak on matters of public concern where she can show her speech was in fact on matters the law recognizes as protected.

E. The Petitioner Stephen Hopper as the CEO of the Petitioner hospital was delegated by the board of the hospital with final and complete responsibility not just to hire and fire but to develop personnel policies and procedures. Hopper first developed the policy restricting employee speech critical of the hospital to be delivered only to hospital supervisors exclusive of any persons of lesser hierarchical stature. In addition, Hopper, as the clearly defined final authority, as delegated to him by the

hospital board in matters of hiring and firing, participated both in the decision to discharge Churchill and then, unknown to Churchill, to affirm that decision in a grievance proceeding she filed with him. As such, Hopper, as the final authority on matters of hiring and firing and personnel policies generally, expressed the policy of the hospital in discharging Churchill in violation of her right to speak on matters of public concern.

ARGUMENT

I.

THE EVIDENCE BEFORE THE DISTRICT COURT ON SUMMARY JUDGMENT SUPPORTS A FINDING THAT PETITIONERS WERE MOTIVATED BY CHURCHILL'S PROTECTED SPEECH TO DISCHARGE HER.

A.

Principles Governing On Summary Judgment And Governing Disposition Of Cases Raising First Amendment Speech Issues Support The Court Of Appeals' Finding That Issues Of Fact Exist As To Whether Petitioners Were Motivated By Churchill's Protected Speech To Discharge Her.

Public employees cannot "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of (the public entity) in which they worked. . . . " *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Public employees in specialized areas " . . . are, as a class, the members of a community most likely to have informed and definite opinions [respecting the operation of the public entity for which they work]." *Id.* at 572. For that reason, it is "essential that [public employees] be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.*

For public employee speech to be protected, it must be on a matter of public concern. *Id.* at 568, 572. Whether speech is on a matter of public concern is determined "by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-148 (1983).[17] "[T]he inquiry into the protected status of speech is one of law, not fact." *Connick, supra* at 147-148 n.7. But what the content, context, and form of the speech in question are present issues of historical fact. *Rankin v. McPherson*, 483 U.S. 378, 385-386 ns. 8, 9 (1987); Schwarzer, *Summary Judgment Motions*, 139 F.R.D. 441, 455-456, 487 (1992). If it is determined the speech was protected, the plaintiff must then prove as a factual matter that it "was . . . a 'motivating' factor" in the termination decision. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). See also *Village of Arlington Heights v. Metropolitan Housing District*, 429 U.S. 252, 264-65 (1977) and *Washington v. Davis*, 426 U.S. 229 (1976).

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[17] Churchill does not understand Petitioners to challenge the court of appeals' holding, Pet. App. 10-22, that the cross-training policy in terms of content was a matter of public concern. Pet. 11-12 n.11. Cf. Brief, United States, pp. 12-13 n.2. This Court has defined "public concern" as referring "to any matter of political, social, or other concerns of the community." *Connick v. Myers, supra*, 461 U.S. at 146. See *Frazier v. King*, 873 F.2d 820 (5th Cir. 1989) (quality of nursing care received by inmates in prison hospital, matter of public concern). See discussions of public concern in *Piver v. Pender Board of Education*, 835 F.2d 1076, 1078 (4th Cir. 1987) and more recently, in *O'Connor v. Steeves*, 994 F.2d 905, 913-915 (1st Cir. 1993). The context of Churchill's speech is disputed, Churchill claiming it came in the midst of a six month debate between the professional staff and the administration on nurse staffing policies, the defendants claiming it was the culmination of a series of acts of insubordination. The form of the speech appears to be undisputed, namely, oral comments made during a dinner break. The content, of course, is vigorously disputed.

See also *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2749 (1993).

" 'First Amendment freedoms need breathing space to survive. . . . ' " *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967). For that reason, " 'government may regulate in the area [affecting First Amendment freedoms] only with narrow specificity.' " *Id.* Therefore, " '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms. . . . ' " *Id.* at 603. The reason " 'precision of regulation must be the touchstone . . . ' ", *Id.*, is that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Speech protected by the First Amendment permits the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Therefore, a paramount priority of the First Amendment is to protect expression relating to "the manner in which government is operated or should be operated." *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966).

Against that framework for considering public employee free speech cases, Petitioners say:

> "[t]here is no evidence that Defendants ever were informed that Churchill had discussed cross-training with Graham. Thus, Defendants could not have been motivated by Churchill's allegedly protected speech when they made the decision to terminate her."

Pet. Brf. p. 24. Petitioners then say:

> "[t]he undisputed fact remains that at least some of Churchill's version of the conversation – the only portion reported by Ballew and Graham – did not address issues of public concern. Since there was no evidence defendants were motivated by anything other than Ballew's and Graham's reports, the Court of Appeals erred in finding a genuine issue of material fact as to the content of the conversation."

Pet. Brf. pp. 34-35 (emphasis omitted). The thrust of both those submissions by the Petitioners is not just in dispute in the summary judgment record, it is belied by the summary judgment record.

The summary judgment record is explicit: Davis made the decision to terminate because she understood Churchill had (i) said "Cindy was a poor manager", (ii) said "[Davis] was ruining the hospital", (iii) said "the department was run badly", (iv) said "[Waters] treated [Churchill] . . . badly", and (v) had "talked about her evaluation." R.76A, T.5, pp. 287-288. By any etymological or syntactical measure, the first three points Davis understood of Churchill's speech more clearly denote policy than personal criticisms. They represent an "impersonal attack on government operations" which is constitutionally protected. *Rosenblatt v. Baer*, 383 U.S. 75, 80 (1966).

Hopper, in turn, was motivated to, first, participate in the discharge decision and then to uphold it on the basis of his understanding that Churchill had (i) said "Davis was ruining the hospital", (ii) said "things were not good in OB and administration was responsible", and (iii) had reported an "instance . . . where . . . [Waters] continued to pursue the matter of a patient complaint against [Churchill]." R.76C, T.10, pp. 156-157.[18] Again, the

[18] Churchill concedes that her reported statements that Waters treated her badly, Waters was pursuing the matter of a false patient complaint against her and that she talked about her evaluation are likely private, unprotected speech. Those statements form 38% of the speech which motivated Davis and Hopper to act, the remaining 62% denoting likely policy criticism which Hopper, Waters and Davis had "no reason to disbelieve" was protected speech. Cf. *Connick, supra*, where this Court held that where only one out of fourteen items on a questionnaire constituted protected speech, the speech was more properly viewed as an employee grievance.

first two points Hopper understood of Churchill's speech more likely denote policy than personal criticism.

Davis said "[she] [didn't] know if [Churchill] was talking about the cross-trainee program or staffing or what . . . " and acknowledged that Graham did not "specify in what respects [Churchill] thought [Davis] [was ruining the hospital]." R.76A, T.5, pp. 287-289. Instead, Davis' "impression" was that Churchill and Graham were "speaking just generally . . . overall without any specifics." *Id.* Likewise, Hopper had "no reason to disbelieve" Churchill's statements that Davis was "ruining the hospital" and "things were not good in OB and administration was responsible" referred to cross-training. R.76C, T.10, pp. 159-160. He further said he had "no reason to disbelieve that any criticism that Churchill may have leveled against . . . Waters . . . related to [cross-training]." *Id.* at 162.

The court of appeals held that speech was protected conduct under *Mt. Healthy* and Churchill, by having shown she was fired for having engaged in speech which, as far as Petitioners understood, was on cross-training, had satisfied the *Mt. Healthy* causation test. The court held it unnecessary that the employer knew the "precise content of the speech." 977 F.2d at 1127. The court thus applied *Mt. Healthy* so as to ensure that Churchill's speech which Petitioners claimed was personal and unprotected "actually [fell] within the unprotected category." *Bose v. Consumers Union*, 466 U.S. 485, 505 (1984). It held that could be determined only by a jury finding whether the point of the speech in question concerned the nurse staffing issues which the court held were of public concern. 977 F.2d at 1127. Thus, the court appropriately applied *Mt. Healthy* to "confine the perimeters of any unprotected category within acceptably narrow limits in

an effort to ensure that protected expression [would] not be inhibited." *Bose, supra,* 466 U.S. at 505.[19]

On summary judgment, the nonmoving party "must make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). However, as established in *Adickes v. Kress & Company,* 398 U.S. 144, 156-157 (1970), and reaffirmed in *Celotex, supra,* 477 U.S. at 325, that showing can be made where the "sequence of events create[s] a substantial enough possibility [that the nonmoving party can establish the essential element] to allow [the nonmoving party] to proceed to trial. . . . "[20]

The *Adickes* principle applies to this case. It supports the rationale and result reached by the court of appeals under either or both of two established approaches, (i)

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[19] See also *Rankin v. McPherson,* 483 U.S. 378, 386 n.9, quoting *Bose, supra,* 466 U.S. at 499, saying "in cases raising First Amendment issues [the Court has] repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' "

[20] Petitioners devote pages 33-36 of their brief to arguing the district court was correct in granting summary judgment to them. They fail, however, to advise this Court that in granting summary judgment, the district court overlooked all but two pages of Churchill's 38 pages of testimony as to the content of her speech. It overlooked all of Welty's and Koch's testimony relative to the content of Churchill's speech. The two pages of Churchill's testimony the district court acknowledged (R.76D, T.18, pp. 342-344) were not pages where she responded to questions asking what she said; rather, she was responding to questions asking what she did not say. And, even in those pages, Churchill specifically refuted the "hostility" and intent to "gripe" theories that the district court found motivated her speech even though she was the nonmoving party on summary judgment.

the historical context in which the discharge decision occurred and (ii) the Petitioners' "deliberate indifference" to protected conduct. Those approaches permit "a jury . . . to infer from the circumstances that [the Petitioners were motivated by Churchill's protected speech to discharge her]", *Adickes, supra,* 398 U.S. at 158. That is particularly true where motive is in issue because motive, similar to intent, "rarely can be decided on summary judgment." *Harlow v. Fitzgerald,* 457 U.S. 800, 816-17 (1982).

1.

The Record Shows Petitioners Discharged Churchill Upon Reports Of Speech Denoting Criticism Of Petitioners' Cross-Training Policy Occurring In The Context Of A Six Month Dispute Concerning That Policy Thereby Raising A Question Of Material Fact As To Whether Petitioners Were Motivated By Churchill's Protected Speech To Discharge Her.

To determine motivation for official action alleged to infringe constitutionally protected interests, "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Village of Arlington Heights v. Metropolitan Housing Corp., supra,* 429 U.S. at 267. Thus, "[t]he specific sequence of events leading . . . to the challenged decision . . . may shed . . . light on the decision maker's purposes." *Id.* See also *Washington v. Davis, supra,* 426 U.S. at 242. "Determining whether [an] invidious . . . purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights, supra,* 429 U.S. at 266.

Disregarding principles governing on summary judgment, the Petitioners' statement of Churchill's employment history (Pet. Brf. 4-9) overlooks that before and after

August 21, 1986, Churchill was acknowledged, in Petitioners' own objective evaluations, to be a conscientious and dutiful employee. Indeed, the most remarkable fact to emerge from the record and emphasized by Petitioners, albeit for the wrong reasons, is that Churchill specifically avoided pleading her own employment circumstances on the one occasion she understood she was in conflict with her supervisors, the code pink incident, and the other occasion where her supervisors created, unbeknownst to her, a conflict, the January 5, 1987 evaluation (pp. 12-13, *supra*). She, therefore, avoided the plaintiff's actions in *Connick v. Myers, supra*, 461 U.S. at 148, where the Court concluded that what the plaintiff claimed was protected speech was in fact an attempt "to gather information for another round of controversy with her supervisors . . . and . . . turn [her] displeasure into a cause celebre."

Petitioners denigrate Churchill's claim that she was fired for having engaged in protected speech by saying that others spoke critically of cross-training and none was fired for it. It is true that the hospital sometimes tolerated criticism of cross-training.[21] But, it was Churchill's professional and personal friendship with Dr. Koch that made her criticism on January 16 potent. The hospital, as Justice Holmes said,"allow[ed] opposition by speech" when it "thought the speech impotent, as when a man says he has squared the circle. . . . " *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) (1919). In light of the fact that public employee speech is of specially recognized value to the community, *Pickering, supra*,

[21] Not always. At least one other OB nurse, Jan Sullivan, who criticized the cross-training policy to a hospital board member at a non-hospital related luncheon, was reprimanded by Kathy Davis. R.92, Sullivan Dep. pp 11-13. She was told not to discuss hospital matters such as the cross-training policy outside the hospital. *Id.*

391 U.S. at 572,[22] it rightly is not restricted to only the innocuous. See *Rankin v. McPherson, supra*, 483 U.S. at 387. (" '[D]ebate on public issues should be uninhibited, robust, and wide open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' ")

Most importantly, the factual picture presented by the Petitioners overlooks the surreptitious campaign conducted by Waters, Davis and Hopper after the August 21 "code pink" to rid themselves of Churchill and Koch. Dr. Koch's and Churchill's role in the controversy surrounding the policy led Petitioners to maintain special files on both of them in an effort to gather information and take action against them on a pretext independent of their speech.[23]

Thus, they attacked Dr. Koch on the basis of the code pink and its aftermath where his professional performance and behavior were nothing short of exemplary.

[22] See in that regard *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940), holding that a broad conception of the First Amendment is necessary

> "to supply the public need for information and education with respect to the significant issues of the times . . . Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

[23] Consequently, the series of supposed transgressions by Churchill listed by Petitioners at pp 4-9 of their brief. Not only are all events listed disputed, they are all refuted by Petitioners' objective evaluation of Churchill as late as three weeks before her discharge. At the very best, they reflect complaints solicited by Waters after the code pink, none of which was ever brought to Churchill's attention. Their meritless nature is highlighted by Petitioners' position, sustained by the district court, that Churchill had no property interest in her employment and, therefore, could have been discharged for any reason or no reason at all. *Board of Regents v. Roth*, 408 U.S. 564 (1972). She was not, however, discharged until her January 16 speech.

They distorted that performance and behavior into allegations of his being out of control.[24] But, they were ultimately unsuccessful in preventing his reappointment to the staff in 1987.

At the same time, they gave Churchill a written warning for snapping at Waters during the code pink, a stressful procedure, after Waters, without information about the care Churchill had already given her patient or the instructions Dr. Koch had given Churchill, ordered Churchill to leave and check on a patient. A jury could readily determine that it was Waters who acted unreasonably and that a fair minded administrator would recognize Churchill's response as understandable and would have agreed to place Dr. Koch's commendation of Churchill in her personnel file.[25] A jury could also conclude that Petitioners' reliance on this incident as a basis for disciplining Churchill was strained and not in good faith, in short, a pretext for disciplining her for her opposition, in conjunction with Dr. Koch, to cross-training.

Similarly, Waters appended to Churchill's generally favorable final evaluation in January, 1987, vague

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[24] Consider the meeting among Koch, Waters and Hopper in the immediate aftermath of the code pink. It would be difficult to more diligently state a doctor's considered yet spontaneously spoken concerns for the welfare of patients and employees alike than do Hopper's notes of what Koch said at that meeting. See n.6, *supra*. But, Waters and Hopper did not advise administrative chief of OB McPherson or medical chief of staff Lefler of what Koch had said when they met with them on August 22 and August 25 respectively. Instead, they told them that Koch was out of control and that Churchill was somehow in league with him and the two of them had to be disciplined. R.76C, T.12, pp 15, 24, 33-35, 103.

[25] Dr. Koch did not know Churchill had received a written warning when he delivered the letter of commendation to Hopper. R.76E, T.20, p. 2. Churchill had obeyed Davis' order not to speak to anyone about it. R.76E, T.38, p.2; R.76D, T.18, pp 169, 173-174.

allegations of "negative behavior." Waters did not identify any incident in which Churchill exhibited such "negative behavior." She did not mention that criticism to Churchill in their meeting to review the evaluation. The allegations were not in the form prescribed in the handbook for written warnings. R.76A, T.1, p. 36. Therefore, the evidence is in dispute, at least, about whether there was any basis for the "negative behavior" charge or whether it too was a subterfuge for the hospital's attempt to stifle Churchill's opposition to cross-training. A jury could well conclude it was a subterfuge.

It could also conclude that whether it was or not, Waters was not acting in good faith by adding her note to Churchill's evaluation because she did not even discuss it with Churchill. Rather, she appended it, in collaboration with the other Petitioners, in the attempt to build a case against Churchill motivated, in fact, by Churchill's opposition to the crosstraining policy.

It was in that context Petitioners received the report from Ballew, a nurse who had already been providing them tidbits against both Churchill and Koch, about the dinner break conversation Churchill had with Graham and Dr. Koch. Petitioners concede that this conversation included discussion of the nurse staffing issues, including cross-training. They do not dispute that this was a matter of public concern. Ballew, however, heard only "bits and pieces" of the conversation and did not understand what she heard.

Nevertheless, in the context of the history of the crosstraining policy controversy, much of what Ballew and Graham reported must have struck Petitioners as comments by Churchill related to that controversy. At least, a jury could so conclude. For example, Graham reported that Churchill said conditions in OB were not good and that Davis was "ruining" the hospital. Given Petitioners' familiarity with the controversy about cross-training, Dr. Koch's and Churchill's role in it, their antagonism toward Dr. Koch and Churchill on the basis of it, a

jury might well determine that Petitioners knew that her comments were directed to that issue or that it was unreasonable for them not to realize that.

Moreover, Graham might not have understood what Churchill said but a jury could well decide on the evidence that Petitioners surely did as Davis was relatively new to MDH and the cross-training policy was clearly identified with her. Both Churchill and Dr. Koch made known that they believed the policy as implemented in CB sacrificed patient care and safety in an unreasonable attempt to realize cost savings. Thus, this is not a case where Petitioners had no indication that the speech was about a matter of public concern.

Nor is it the case where Petitioners made a reasonable investigation and concluded incorrectly that the speech was not about a matter of public concern. Rather, a jury could recognize that Petitioners would know that any criticism of Davis by Churchill was likely related to the cross-training policy – particularly in the terms it was reported to and understood by Petitioners, viz, "Davis going to ruin the hospital", "things bad in OB and administration responsible."

Cast into the framework of this Court's most recent pronouncement on the burden of proof in employment cases, *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2749 (1993), Churchill can show the following: she was discharged for having engaged in speech; her employer was motivated by reports of her speech denoting policy criticisms to discharge her; her employer had "no reason to disbelieve" her speech concerned cross training; and her speech was protected. The only thing she cannot conclusively show is that the employer knew the precise content of her speech and discharged her for having engaged in protected critical speech as opposed to critical speech *simpliciter*.

Yet, placed into the context of the six month dispute between the professional nursing and medical staffs and the hospital administration concerning nurse staffing

issues generally and cross-training in particular, as described *supra*, pp. 32-35, a fact finder could readily disbelieve the "insubordination" "reasons put forward by the defendant." *St. Mary's Honor Center, supra*.[26] That disbelief, "together with the elements of the *prima facia* case", Churchill can show would "*permit* the trier of fact to infer the ultimate fact [that Petitioners discharged her because of her protected speech]." *Id*. (Emphasis in original). *Adickes, supra*.

2.

The Record Shows That Petitioners Were Deliberately Indifferent To Whether The Reports Of Churchill's Speech, Which Motivated Them To Discharge Her, Referred To Protected Speech On Matters Of Public Concern Thereby Raising Questions Of Material Fact As To Whether They Were Motivated By Her Protected Speech To Discharge Her.

" '[A] deliberate choice to follow a course of action- . . . made from among various alternatives . . . ' " which results in a constitutional deprivation can be actionable under §1983. *Canton v. Harris*, 489 U.S. 378, 389 (1989), quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483-484 (1986). Under the deliberate choice standard, where official action "reflects a 'deliberate' or 'conscious' choice" resulting in a constitutional violation can the official be held liable under §1983. *Canton v. Harris, supra*, 489 U.S. at 389. That conscious choice amounts to "deliberate indifference" where the possible infringement of a right secured by the Constitution is " 'so obvious' that failure to [choose a course of action not violative of the right]

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[26] Cf. *Givhan v. Western Line Con. Sch. Dist.*, 439 U.S. 410, 412-413 (1979), where the employer had pejoratively characterized the employee's speech as "petty", "insulting", etc.

could properly be characterized as 'deliberate indifference' to constitutional rights." *Canton v. Harris, supra,* 489 U.S. at 390 n.10.

Similarly, under the Eighth Amendment prohibition of "cruel and unusual punishment", the Court has concluded that certain failures or refusals to treat prisoners amounts to a constitutional violation. But, the Court has made clear that neither "negligent diagnosis nor customary malpractice would amount to the type of deliberate choice among alternatives which would state a constitutional violation."[27] *See Estelle v. Gamble,* 429 U.S. 97, and ns. 10-12 (1976). Rather, a conscious choice to forego a course which would preserve the constitutional interest is required. *Id.*

This Court explained in *Connick, supra,* 461 U.S. at 147, that its "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government. . . . " In fulfilling that responsibility, no less than the "deliberate indifference" test applied in the Eighth Amendment and municipal policy contexts is warranted to ensure that the free speech rights of public employees are not infringed.[28] The "deliberate

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[27] That, of course, is consistent with the rule that merely negligent infringements of the Due Process Clause do not amount to constitutional violations. *Daniels v. Williams,* 474 U.S. 327 (1986).

[28] The United States suggests a "willful blindness" test extracted from §2.02(7) of the Model Penal Code which provides that

> "when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware whereby probability of its existence, *unless he actually believes that it does not exist.*"

(emphasis supplied). The United States does not explain why that test is more plausible than the "deliberate indifference" standard already employed in some civil §1983 contexts.

indifference" of Waters, Hopper and Davis to Churchill's rights to free speech is manifest.

As far as Waters, Davis and Hopper knew, the subject of Churchill's speech was cross-training. The reports of the speech upon which they acted, "Davis ruining the hospital" and "things bad in OB and hospital administration responsible" more clearly denote policy than personal criticism. Yet, none articulated a reason why he/she chose to view her speech as private and unprotected as opposed to public and presumptively protected. They did say, however, why they did not seek Churchill's version: on Ballew's and Graham's reports they "had enough information [to fire Churchill]." R.76A, T.5, p. 321. Therefore, they decided it "would not have been productive to understand [Churchill's] version of the conversation." *Id.* That was a knowing, conscious choice.

That choice ensured that Churchill's speech, if on cross-training, would be punished. That choice constituted a deliberate avoidance of information which Petitioners recognized could have upset the conclusion they wanted to reach. *Canton v. Harris, supra,* 489 U.S. at 389. From that deliberate avoidance, a jury could find that to

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Presumably due process requires that a higher degree of certainty be shown to prove knowing criminal conduct than should be required to prove conduct subjecting one to civil liability. *In re Winship,* 397 U.S. 358 (1970). Nevertheless, even as this Court has applied the "willful blindness" test in a criminal context in such cases as *Turner v. United States,* 396 U.S. 398 (1970) (defendant would be aware of a high probability that heroin came from a foreign country), and *Barnes v. United States,* 412 U.S. 837, 845-46 (1973) ("petitioner must have known or been aware of the high probability that the checks were stolen . . . "), indicates that Churchill has more than satisfied the "willful blindness" test in this case on the summary judgment record. Indeed, Churchill has negated the possible exemption Petitioners might claim in that Petitioners have admitted they had "no reason to disbelieve" her speech was protected.

punish her speech on cross-training was Petitioners' motivation. *Adickes, supra,* 398 U.S. at 158.

B.

At The Very Least, Churchill Was Dismissed Without Safeguards Necessary To Assure Public Employee Speech On Matters Of Public Concern The Protection the First Amendment Requires.

"When [a court] deal[s] with the complex of strands in the web of freedoms which makeup free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in light of the particular circumstances to which it is applied." *Speiser v. Randall,* 357 U.S. 513, 520 (1957). Thus, a court should ensure that "when the [public employer] undertakes to restrain [and punish] unprotected speech, it . . . provide procedures which are adequate to safeguard against infringement of constitutionally protected rights – rights which we value most highly and which are essential to the workings of a free society." *Id.* at 521. Because "the line between speech unconditionally guaranteed and speech which may legitimately be . . . punished is finely drawn . . . , the separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . . " *Id.* at 525.[29]

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[29] See also *Elfbrandt v. Russell,* 384 U.S. 11 (1966), involving a loyalty oath requirement subjecting to prosecution and discharge from public office any person who "knowingly . . . [became] or remain[ed] a member of the Communist Party . . . " or any organization having for "one of its purposes" the overthrow of a state government where the employee had knowledge of the unlawful purpose. The Court struck down the oath on the grounds that protected association was *indiscriminately condemned along with unprotected association. Id.* To the same effect is *United States v. Robel,* 389 U.S. 258 (1967). (Emphasis supplied).

The principle of *Speiser v. Randall, supra,,* was applied in a public employee union shop setting in *Chicago Teachers v. Hudson,* 475 U.S. 292 (1986), where this Court held the First Amendment required procedures ensuring protection of the rights of nonunion workers not to contribute to union ideological activities even though there was no suggestion contributions were made. The Court held such procedures required because " 'procedural safeguards often have a special bite in the First Amendment context.' " 475 U.S. at 303 n.12 (citations omitted). The purpose of the procedures was

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Likewise in *Roaden v. Kentucky,* 413 U.S. 496 (1973) and *Marcus v. Search Warrant,* 367 U.S. 717 (1961), the Court held that seizures of allegedly obscene materials, even if valid in customary Fourth Amendment terms, were unconstitutional where the seizure indiscriminately subjected non-obscene and, therefore, protected materials to confiscation. The Court held "the seizure[s] . . . unreasonable, not . . . because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness." *Roaden, supra,* 413 U.S. at 504. That higher hurdle is required by the First Amendment and its prohibition of prior restraints. *Id.* Similarly, in *Freedman v. Maryland,* 380 U.S. 51 (1960), the Court, in striking down a Maryland motion picture censorship statute requiring submission of a film to an administrative board prior to showing, held that " . . . a judicial determination in an adversary proceeding" was necessary to "ensure the necessary sensitivity to freedom of expression." *Freedman, supra,* 380 U.S. at 57. See also *Teitel Film Corp. v. Cusak,* 390 U.S. 139 (1968) and *Lo Ji Sales v. New York,* 442 U.S. 319, 326 n.5 (1979).

And, as Justice Kennedy recently noted, "[t]here can be little doubt that regulation and punishment of certain classes of unprotected speech has implications for other speech which is close to the proscribed line, speech which is entitled to the protections of the First Amendment." *Alexander v. United States,* ___ U.S. ___, 61 L.W. 4796, 4801 (1993) (Kennedy, J., dissenting). In those situations, "the government must use measures that are sensitive to First Amendment concerns in its task of regulating or punishing speech." *Id.* at 4804.

"to ensure that the government treads with sensitivity in areas freighted with First Amendment concerns." *Id.* That was necessary because "First Amendment rights are fragile and can be destroyed by insensitive procedures." *Id.*

This Court specifically acknowledged in a public employee retaliatory discharge setting in *Board of Regents v. Roth*, 408 U.S. 564, 574-575 n.14 (1972), the importance of procedure to protect the speech of public employees.[30] In *Roth*, the Court said when the state has "directly [impinged] upon interests in free speech or free press, [it] ha[d] held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards." However, since allegations of "direct impingement" on speech were not before it in *Roth*, the Court declined to apply the doctrine. *Id.*[31]

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[30] See Monaghan, *First Amendment "Due Process"*, 83 Harv.L.Rev. 518 (1970). First Amendment "due process" appears to be another of the "ancillary doctrines", such as "overbreadth" that "helps ensure that government . . . focus[es] on its legitimate interests" "when it [takes] action affecting free speech." Bogen, *First Amendment Ancillary Doctrines*, 37 Md.L.Rev. 679, 681 (1978). See e.g. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

[31] In *Connick v. Myers, supra*, 461 U.S. at 147, the Court said that even unprotected public employee speech does not "fall[] into one of the narrow and well defined classes of expression which carr[y] so little social value, such as *obscenity*, that the state can prohibit and punish such expression by all persons in its jurisdiction." (Emphasis supplied). By the doctrine of *Freedman, supra; Marcus, supra; Roaden, supra*, the prohibition of obscene expressive material requires the establishment of procedures to ensure that nonobscene protected material is not brought within the sweep of the prohibition. Surely, the prohibition by punishment of nonprotected personal speech, speech on a higher rung than obscene speech, *Connick, supra*, by a public employee should not be allowed to sweep within its reach potentially protected speech on matters of public concern. Just as in *Speiser v. Randall, supra; Robel, supra; Freedman, supra; Chicago Teachers, supra*, "sensitive tools" are required to ensure that speech on matters of public concern by public employees is not punished.

Allegations of "direct impingement" are before the Court in this case.

Unlike *Speiser v. Randall, supra*, this case does not involve the question whether the First Amendment requires the employer or employee to bear the burden of proving whether the speech is protected or not. Churchill recognizes MDH "has interests as an employer in regulating speech of its employees that differ . . . from those [the state] possesses in connection with regulation of speech of the citizenry in general." *Pickering, supra*, 391 U.S. at 568. Churchill does not contend that MDH was required to give her a full dress adversarial hearing with rights of cross examination. All this Court need decide is whether MDH was required by the First Amendment to employ other than totally "insensitive procedures" to Churchill's interests before terminating her for what she can show and petitioners had "no reason to disbelieve" was protected speech.

MDH's "insensitive procedures" included summary dismissal in the face of reports of speech suggesting policy criticism when Petitioners had "no reason to disbelieve" that the speech was policy criticism of public concern. They included the refusal by Hopper, during the grievance proceeding, to even hear Churchill out when she, groping for what she thought was the speech which got her in trouble, attempted to discuss cross-training and he said he "didn't want to get into that." Pet. App. 76. Cf. R.76E, T.23, pp 411-416. The "insensitive procedures" included a skewed investigation designed to avoid people who could have advised that her speech was on matters of public concern and, therefore, protected. Thus, the Petitioners did more than put the burden on Churchill to show that her speech was likely protected: they foreclosed her any opportunity to do so.

Instead, Churchill suggests that the minimal procedure authorized by this Court to avert erroneous deprivations of property rights in public employment set forth in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985), would be sufficient. That means that the obligation on the public employer in a situation such as is presented in this case would be to orally or in writing give notice that the employee is being discharged for having engaged in speech, "an explanation of the employer's evidence, and an opportunity to present [her] side of the story." *Id.*[32]

The Petitioners' assertion (Pet.Brf. pp 22 n.21 and 39) that such a procedure would be futile is not accurate on several counts. First, had Churchill been apprised of the evidence against her, she could not only have advised Petitioners of the subject of her conversation, she could have advised them that Dr. Koch and supervisor Welty heard the speech. She could have brought to Petitioners' attention that Ballew heard very little of the speech and of what she heard she understood less. She could have advised that Ballew's assertion she talked to Graham earlier in the shift and Graham had expressed an interest in transferring to OB, R.76A, T.3, p. 103, was unlikely since Ballew did not arrive at work until 5:00 p.m., two hours after the shift began, R.76D, T.17, p. 94, and at the very time all the other witnesses, including Graham, testified that the conversation occurred. Cf. Welty, R.76E, T.24, pp 33-40; Churchill, R.76D, T.18, pp 289-290; Koch, R.76D, T.19, p. 18; Graham, R.76B, T.6, pp 60-63. She could have pointed out, as it would have been the indication from both Welty and Koch, that it was Graham, not she, who made statements critical of Waters in a personal as

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[32] Thus, Churchill suggests far less than the "adversary hearing" mentioned by this Court in *Board of Regents v. Roth, supra*, 408 U.S. at 574-575 n.14, or the judicial hearing required in the obscenity context by *Freedman v. Maryland, supra*, and its progeny.

opposed to policy sense. She could have advised, as it would have been the indication from Welty, that far from having her "enthusiasm dampened", Graham was still enthusiastic about OB at the end of the shift and, therefore, Ballew's assumption to the contrary was a product of her imagination. R.76E, T.24, pp 192-193. Thus, had some attempt been made to ensure that protected speech would not be punished, Churchill likely could not have been lawfully discharged.[33]

Petitioners argue (Pet. Bf., 36-40) they had no duty to investigate beyond what they had done and that all they were obliged to do was to "establish a 'reasonable belief' " that their actions were justified. There is no issue here of a "duty to investigate". Churchill agrees that if the belief an employer forms supporting its adverse personnel action is "reasonable," an employer has no need to investigate further.

However, the employer's belief that speech is private and unprotected is not reasonable where the reports of speech suggest policy criticism and the employer has "no reason to disbelieve" the speech is protected. In that situation, the employer has a duty to reasonably ensure that the speech is, in fact, unprotected before he takes actions which indiscriminately punish protected and unprotected speech. *Speiser v. Randall, supra; Marcus v. Search Warrant,*

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[33] Some process to ensure that speech is unprotected before an employer takes retaliatory action would ultimately benefit employers. By allowing employees an opportunity to tell their side of the story, employers will be effectively insulated from litigation. Such process would give employees the feeling they had been treated fairly and make it less likely they will leave with the feeling they had been dismissed for having engaged in protected activity. Even if they do leave with that feeling, the employer will have available a documented record showing what the circumstances in fact were and that the discharge was reasonable. Therefore, the process Churchill suggests should discourage, not encourage litigation.

supra; Freedman v. Maryland, supra; Keyishian, supra; Bose, supra; Robel, supra; Elfbrandt, supra.

To hold otherwise would all but eliminate public employee speech and its benefits for the public. *Pickering, supra,* 391 U.S. at 572.[34] Whatever are one's views of the underlying purpose or purposes of the First Amendment, at its heart it

> "has a structural role to play in securing and fostering our Republican system of self-government. Implicit in this structural role is not only 'the principle of that debate on public issue should be uninhibited, robust, and wide open', but also the antecedent assumption that valuable public debates – as well as other specific behavior – *must be informed.*"

Richmond Newspapers v. Virginia, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring) (emphasis supplied).

The burning issue in OB in January, 1987 and for the preceding six months was the cross-training policy as it affected that department. Supervisor Jean Welty was listening "closely" to learn from Graham how cross-training was received on the general surgical floor. Churchill and Koch stood to be similarly informed. Graham stood to be advised by their perspectives. Thus, each stood to learn from the other, their individual and separate perspectives adding to information – and understanding. Churchill's speech was the exercise of protected speech in its purest, most salutary form.

The means by which ideas become informed and thereby beneficial are by exposure to the "competition of the market." *Abrams v. United States, supra,* 250 U.S. at 630

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[34] It would also afford far less protection to a public employee's First Amendment speech rights than are afforded to employees' rights under Title VII where, pursuant to *McDonald Douglas Corp. v. Green,* 411 U.S. 792 (1973), a plaintiff can carry his burden of persuasion by proof allowing a jury to infer the ultimate fact. Cf. *St. Mary's Honor Center, supra.*

(Holmes, J., dissenting). It would seem that before a public employee, such as the teacher in *Pickering,* goes public with an erroneous factual statement, he/she should endeavor to see that his/her opinions are informed and reflective of the pertinent facts. That "better informed" quality was the very function of the January 16 speech in this case. *Richmond Newspapers, supra,* (Brennan, J., concurring).

Moreover, Churchill using her dinner break to discuss cross-training with two other individuals is suggestive of her public spiritedness – her desire that the public hospital where she worked effectively deliver its public service.[35] If the position urged by the Petitioners in this case were adopted, public employees will be deterred from ever discussing the public policies of the public employer – even on their own time. That would inhibit the refinement and dissemination of the special knowledge possessed by public employees for the ultimate benefit of the public as recognized in *Pickering, supra,* 391 U.S. at 572. Much is at stake in this case.

II.

THE SUMMARY JUDGMENT RECORD SHOWS THAT PETITIONERS HAD NO REASONABLE BASIS FOR CONCLUDING CHURCHILL'S SPEECH WAS "INSUBORDINATE" AND, THEREFORE, NO REASONABLE BASIS FOR BELIEVING THAT IT DID OR COULD HAVE DISRUPTED THE HOSPITAL'S DELIVERY OF HEALTH CARE SERVICES.

A public employer may avoid liability under the First Amendment by satisfying the so called *Pickering* calculus. That calculus includes showing that otherwise protected speech (i) impaired discipline by superiors or harmony

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[35] Thus, unlike *Rankin v. McPherson, supra,* 483 U.S. at 394-401 (Scalia, J., dissenting), there can be no suggestion that Churchill's speech was contrary to the mission of the agency for which she worked.

among co-workers; (ii) had a detrimental impact on close working relationships where necessary; (iii) impeded the performance of the speaker's duties; or (iv) interfered with the regular operation of the enterprise. *Pickering, supra,* 391 U.S. at 570-573. But, in *Pickering,* this Court said the "only way . . . [the public employer] could conclude, absent any evidence of the actual *effect* of the [speech] that the [speech] . . . [was] . . . detrimental . . . was to equate the [individual supervisors'] own interests with that of [the public entity]." *Pickering,* 391 U.S. at 571 (emphasis supplied).[36] Not even Petitioners suggest there is any evidence of actual disruption in this case.

However, the Petitioners have mistakenly seized upon language from *Connick v. Myers, supra,* 461 U.S. at 154, that a public employer need not "tolerate action which he reasonably believes would disrupt the office, undermine his authority, and destroy close working relationships before he takes action." The *Connick* "reasonable belief" test by its own terms applies only when the speech "touch[es] upon matters of public concern in only a most limited sense . . . ", *Connick, supra,* 461 U.S. at 154. That is not the situation in this case where, as far as Petitioners knew, 62% of the speech that motivated them to discharge Churchill was protected.

Specifically, under the *Connick* "reasonable belief" criteria, there is no suggestion that Churchill "personally confront[ed] [her] immediate superior [whereby the hospital's] efficiency may [have been] threatened not only by [her] message but also by the manner, time, and place in which it

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[36] The circuits generally agree that some evidence of the actual effect of the speech is necessary to tip the *Pickering* balance in favor of the employer. *Jungels v. Pierce,* 825 F.2d 1127, 1132 (7th Cir. 1987) (testimony about adverse impact was "speculation and not all of it [was] plausible speculation"); *Flanagan v. Munger,* 890 F.2d 1557, 1566-67 (10th Cir. 1989); *Piesco v. New York,* 933 F.2d 1149, 1159 (2nd Cir. 1991); *Jackson v. Bair,* 851 F.2d 714, 717 (4th Cir. 1988); *Czurlansis v. Alabnese,* 721 F.2d 98, 107 (3rd Cir. 1983).

[was] delivered." *Connick, supra* at 153. Additionally, Churchill's "speech concerning . . . policy [did not arise] from an employment dispute concerning the very application of that policy . . . [to her]." Therefore, the Petitioners had no reason to perceive that Churchill had "threatened the authority of the employer to run the office." *Id.*

Indeed, only Hopper testified Churchill's speech had any adverse effect. He referred to Churchill's statement that Kathy Davis was "ruining the hospital" and said that statement "undermined" the work Davis was doing in the hospital. But, when asked how he knew that, he could only say he "disagree[d]" with the statement. R.76C, T.10, pp 156-160.

That, Churchill respectfully submits, is what this case is all about. Churchill opposed the nurse staffing policy, but did nothing to impede its operation. Had she, for example, precluded or attempted to preclude Graham from working as a cross-trainee or, as Ballew incorrectly assumed, "dampened her enthusiasm", or had her speech interfered with her performance of her duties or anyone else's performance of their duties, the *Pickering* factors on summary judgment might tip in favor of the Petitioners. But, on the record as it must be viewed on summary judgment, those things did not happen. Petitioners had no reasonable basis for assuming it did or could have. *Adickes, supra; Celotex, supra.*

That point is underscored by Justice Powell's concurring statement in *Rankin v. McPherson, supra,* 483 U.S. at 393, that "it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace." The majority in *Rankin* adopted that position, 483 U.S. at 388 n.13. That point applies here with greater force than in *Rankin* because Churchill's speech was consistent with and in furtherance of the mission of her public agency whereas the plaintiff's in *Rankin* was not.

III.

THE INDIVIDUALLY NAMED PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS IT WAS CLEARLY ESTABLISHED IN JANUARY, 1987 THAT A PUBLIC EMPLOYEE COULD NOT BE DISCHARGED FOR ENGAGING IN ON-PREMISES PRIVATE SPEECH ON THE EMPLOYEE'S OWN TIME ON A MATTER OF PUBLIC CONCERN WHICH DID NOT INTERFERE WITH THE EMPLOYER'S DISCHARGE OF THE PUBLIC FUNCTION AND GAVE RISE TO NO REASONABLE BELIEF THAT IT COULD HAVE.

After *Anderson v. Creighton*, 483 U.S. 635 (1987), a court must determine whether a public official violated clearly established rights in light of the information reasonably available to him. The broad question for qualified immunity purposes is whether it was clearly established in January, 1987 that a public employee, on her own time, had a right to engage in on-premises private speech denoting criticism of the policies of the public employer which the employer had "no reason to disbelieve" was on matters of public concern. That is the level of specificity at which this case must be analyzed, *Anderson v. Creighton, supra*, 483 U.S. at 641, because that is precisely what the Petitioners knew when they fired Churchill. The affirmative answer to that question was given in *Pickering, supra*, in 1968 and in *Givhan v. Western Line Consolidated School District, supra* in 1979.

In addition, a distinguished line of First Amendment cases including *Speiser v. Randall, supra; Elfbrandt v. Russell, supra; United States v. Robel, supra; Freedman v. Maryland, supra; Chicago Teachers v. Hudson, supra; Bose v. Consumers Union, supra;* requiring "sensitive procedures" when the line between protected and unprotected speech is "finely drawn", *Speiser v. Randall, supra,* must be factored into the qualified immunity analysis. Those cases are a corollary to the rule well recognized in public employee speech cases that official action ensure that what is claimed as unprotected speech "actually [falls] within the unprotected category." *Bose, supra,* 466 U.S. at 505; *Rankin v. McPherson, supra,* 483 U.S. at 386, n.9.

Thus, contrary to Petitioners' argument, to say a reasonable public official "could have believed", *Hunter v. Bryant*, 112 S.Ct. 534, 536 (1991), that Churchill's speech was unprotected is not sufficient when the rights at stake are those protected by the First Amendment and, *a fortiori*, where the official had "no reason to disbelieve" the speech was protected.[37] *Keyishian v. Board of Regents, supra,* 385 U.S. at 603-604. See also *Marcus v. A Search Warrant, supra; A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); and *Roaden v. Kentucky, supra.* In those circumstances, the question for qualified immunity purposes must be refined to whether a reasonable officer could have failed to believe there was a reasonable probability that Churchill's speech was protected. *Hunter v. Bryant, supra,* 112 S.Ct. at 536. The further question is whether a reasonable public official could have failed to realize that taking summary retaliatory action without knowing the content of the speech beyond that it was critical of hospital policies created an unreasonable risk of punishing protected speech. *Id.; Pickering, supra; Bose, supra; Marcus v. A Search Warrant, supra; Roaden v. Kentucky, supra; Speiser v. Randall, supra.*[38] The negative answer to those questions is

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[37] Churchill does not concede that even in *Hunter v. Bryant* terms a reasonable public official "could have believed" her speech was unprotected.

[38] In their brief at page 45 n.40, the Petitioners argue that the Seventh Circuit ignored its own holding in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991). That is inaccurate. *Elliott v. Thomas* involved a plaintiff who had been transferred from a university laboratory for what she claimed was speech criticizing her superior's alleged conflict of interest. But, the university officials were advised only that the conditions in the laboratory had deteriorated because of a bad personnel situation altogether without reference to speech. The officials said they transferred her for that reason. The Seventh Circuit held that the question for qualified immunity purposes was "not what the conditions in the laboratory *were*; it is what the administrators reasonably believed them to have been." 937 F.2d at 343, 344 (emphasis in original). The plaintiff offered "no reason

manifest in light of long established First Amendment doctrine in the area of public employment. *Board of Regents v. Roth, supra; United States v. Robel, supra; Elfbrandt v. Russell, supra; Chicago Teachers, supra.* It is even more manifest in light of the fact that, as noted above, the tenor of the speech upon which Petitioners acted was, more likely than not, policy criticism rather than personal criticism.

IV.

THE HOSPITAL ACTED PURSUANT TO EITHER ITS STATED POLICY OF PERMITTING CRITICAL SPEECH BY EMPLOYEES TO BE DELIVERED ONLY TO SUPERVISORS OR ITS POLICY AS MANIFESTED THROUGH THE ACTION OF ITS ULTIMATE POLICY MAKER, CEO STEPHEN HOPPER.

A.

Hopper As CEO Of MDH Established A Personnel Policy Requiring That Employee Speech Critical Of The Hospital Be Delivered To Supervisors Only.

The "authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority . . . ",

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other than her suspicions to doubt the [university's] account of its [actions]. 937 F.2d at 346.

Petitioners argue that doctrine applies to this case. They say the characterization of Churchill's speech, "negative" and "inappropriate" by Ballew and Graham puts them in the same position as was the university when it heard that conditions had deteriorated and transferred the plaintiff for that reason.

Three fundamental points defeat Petitioners' position. First, they cannot escape that it was Churchill's speech, not deteriorating conditions, or anything else which precipitated her discharge. Second, as far as they knew, her speech was protected as being on a matter of public concern. Third, it was not reasonable for Petitioners to accept Ballew's and Graham's reports as accurately representing Churchill's speech or its effects. See discussion, *supra*, at 12-16, 38-39.

Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986); *St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1985) (Plurality Opinion). Moreover, "the authority to make municipal policy is necessarily the authority to make *final* policy." *Praprotnik, supra*, 485 U.S. at 127. (Emphasis in original). "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id.* The "identification of policy making officials is a question of state law." *Id.* at 124.[39]

Pursuant to its authority as conferred in 70 ILCS §910/15-6 and §910/17, the board of directors of McDonough District Hospital enacted Bylaws for the governance of the hospital. R.50, Bylaws, p.12. Article IX of the Bylaws entitled "Administration" directs the board to employ a chief executive officer "who shall be [the board's] direct executive representative in the management of the hospital." R.50, Bylaws, p.12; R.76A, T.2. Additionally, the board has delegated to the CEO "the necessary authority . . . for the administration of the hospital and all its activities and department, subject to only such policies as may be adopted and such orders as may be issued by the

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[39] Applying those principles to hospital districts in Illinois, 70 ILCS §910/15 provides that "a hospital district shall constitute a municipal corporation. . . . " The hospital districts are "governed by a board of nine directors appointed . . . by the presiding officer of the county board with the advice and consent of the county board." 70 ILCS §910/11. Among the powers of the board of directors is the power "to employ or enter into contracts for the employment of any person, firm, or corporation, and for professional services necessary . . . for the accomplishment of the corporate objects of the district. . . . " 70 ILCS §910/15-6. Action of the board of directors of a legislative character "shall be in the form of an ordinance. . . . " 70 ILCS §910/17. "Other action of the board may be by resolution, motion, or other appropriate form, and executive or ministerial duties may be delegated to one or more directors or to an authorized officer . . . of the district." *Id.*

board of directors or by any of its committees. . . . " *Id.* The administrator is further to "be held responsible for the administration of the hospital in all its activities and departments. . . . " *Id.* Further specifying the authority and responsibility of the administrator is §2 of Article IX where, in ¶(D), the Bylaws provide that the administrator is responsible for "selecting, employing, controlling, and discharging employees and developing and maintaining personnel policies and practices for the hospital." *Id.*, T.2.

In the face of what would appear to be explicit legislative and Bylaw authority delegating to the administrator of MDH final authority respecting personnel matters, the Petitioners say it is not so. They claim that legislative authority is reposed in the board and they equate "legislative" authority with policy making authority which they say cannot be delegated.

However, in making that argument the Petitioners have disregarded that this Court has said "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Pembaur, supra*, 475 U.S. at 480. Rather, under *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694, there are "other officials 'whose acts or edicts may fairly be said to represent official policy' and whose decisions, therefore, may give rise to municipal liability under §1983." *Pembaur, supra*, 475 U.S. at 480. And, Petitioners overlook that under Illinois law a hospital district "can freely establish its own rules, regulations, and qualifications [for executive personnel policy making authority]" and "Bylaws [can] contain such expressions of purpose. . . . " *Ladenheim v. Union County Hospital District*, 394 N.E.2d 770, 776 (Ill.App.5th, 1979). Petitioners have overlooked that "bylaws are an integral part of the contractual relation between a hospital and the member of its staff", presumably including the CEO of the hospital. *Fahey v. Holy Family Hospital*, 336 N.E.2d 309, 314 (Ill.App.1st 1975).

In unmistakable terms, the board of directors of MDH has delegated to CEO Hopper the full authority not just to

hire and fire but to "develop[] and maintain[] personnel policies and practices for the hospital." R.76A, T.2. Pursuant to that authority, Hopper created some personnel policies. R.76A, T.1, p.6. Among the policies is a policy "to respect the individual employee's rights and assure employees of their right to freely discuss with supervision any matter concerning their own or the hospital's welfare." *Id.*, No. 9. That policy was construed by Hopper and by the vice president for personnel, Bernice Magin, to restrict employee criticism of hospital policies to that delivered to the supervisors. Magin was explicit when, in responding to questions concerning employee criticism delivered to fellow employees, she said

> "I would prefer that [the employee] bring the matter directly to my attention. That's what we encourage employees to do is go to their supervisor."

R.143, T.E, p. 71. Magin then said that if the same employee persisted in failing to bring the matter to the supervisor that "it would . . . be negative behavior." R.143, T.E, p. 80.[40]

Hopper was equally if not more explicit. After answering that the only thing wrong with Churchill's speech to the extent she said Kathy Davis was "ruining the hospital" was that he "[d]isagreed" with it, said, "she [was] voicing it to the wrong forum." R.76C, T.10, p. 158. He said that she should have voiced it to the supervisors, "Cindy Waters, Kathy Davis, or myself." *Id.*

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[40] Consistently with their practice of drawing all inferences in their favor, Petitioners indicate at page 48 that "Magin's comments . . . indicate only that hospital managers . . . might become upset if employees went over their heads or criticized them personally. . . . " That is not what Magin said. *A fortiori*, it is not what she should be construed as having said on summary judgment, drawing all inferences in favor of Churchill.

Likewise, in their brief at p. 48, n.42, Petitioners advise of employers' "open door" policies. Churchill certainly has no objection to "open door" policies. However, they should not be construed so as to preclude the type of discussion involved in this case among co-employees on their meal breaks.

B.

Hopper's Participation In The Discharge Decision And His Ratification Of That Decision Constitute Hospital Policy As The Final Act Of The Highest Hospital Authority.

Assuming a fact finder were to find that a policy restricting employee speech critical of the policies of the hospital to only supervisors did not exist, the fact that Hopper participated at two levels of Churchill's discharge, the discharge decision and the grievance proceeding demonstrates that her discharge was the official policy of the hospital district. *Pembaur v. City of Cincinnati, supra,* 475 U.S. at 479-481. Importantly, that was Hopper's understanding as well. He said the board would not have the power, under the current delegation to him of final authority in personnel matters, "to override [his decision]." R.76C, T.11, p. 31. Rather, "[his] decision is final." *Id.*

V. CONCLUSION

For the reasons above stated, the judgment of the court of appeals should be affirmed.

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No. 92-1450

In The

Supreme Court of the United States

October Term, 1993

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,

Petitioners,

v.

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

After all that has been said and done here, this much seems clear:

1. There is no genuine issue of material fact regarding the content of respondent Cheryl Churchill's ("Churchill") conversation with fellow nurse Melanie Perkins-Graham ("Graham") on January 16, 1987. Solely for purposes of their motion for summary judgment, defendants did not dispute Churchill's account of this conversation.

2. During a portion of the conversation, Churchill says she criticized aspects of the Hospital's program of cross-training nurses, potentially a subject of public concern. But Churchill admits that during this same conversation, she also discussed her supervisor Cynthia Waters's ("Waters") relationship with her, Waters's attributes as a supervisor and recent evaluation of her, and Churchill's negative opinion of nursing vice president Kathleen Davis ("Davis") – personal concerns, not concerns of the public, and thus unprotected under *Connick v. Myers*, 461 U.S. 138 (1983).

3. Defendants received reports of *this unprotected portion of the conversation* from nurse Mary Lou Ballew ("Ballew") and from Graham herself. Churchill does not dispute defendants' accounts of what was reported to them. There is no evidence from which any reasonable jury could conclude that these reports somehow put defendants on notice of Churchill's allegedly protected statements about cross-training.

4. Under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), Churchill must show that her protected speech was a "motivating factor" in defendants' decision to terminate her.

5. Defendants could not have been motivated by what Churchill actually *said* to Graham because they were not present at the conversation.

6. Defendants could only be motivated by what was reported to them.

7. The speech reported to Defendants was the type of speech found unprotected in *Connick*. Accordingly, defendants could not have had an impermissible motive when they decided to terminate Churchill based on the reports.

Churchill claims defendants still can be held liable for retaliatory discharge because they had "no reason to disbelieve" that the reported comments referred to cross-training. The factual predicate for Churchill's position finds no support in the record, and the unworkable rule of decision she suggests finds no support in this Court's First Amendment cases.

ARGUMENT

I.

DEFENDANTS DID NOT VIOLATE THE CONSTITUTION WHEN THEY TERMINATED CHURCHILL BASED ON BELIEVABLE, SUBSTANTIATED REPORTS OF UNPROTECTED, INSUBORDINATE SPEECH.

A. Churchill's Retaliatory Discharge Claim Fails Because There Is No Evidence That Any Protected Speech Was a "Motivating" Factor in Her Termination.

1. What Matters Under *Mt. Healthy* Is What Defendants Believed, Not What Churchill Says They Had "No Reason to Disbelieve."

Under *Mt. Healthy*, the plaintiff in a First Amendment retaliatory discharge case must show that constitutionally

protected conduct was "a 'motivating factor' in the [employer's] decision" to terminate her. 429 U.S. at 287. Churchill says she satisfied this requirement "by having shown she was fired for having engaged in speech which, *as far as Petitioners understood*, was on cross-training." (Resp. Br. at 23) (emphasis added).

Defendants "understood" no such thing, and Churchill cites not one line of testimony that supports this assertion. Instead, she relies on the individual defendants' refusal to speculate at their depositions, months or years after Churchill's termination, as to what Churchill might have said *besides* what was reported or what motivated her to express her dissatisfaction. Churchill attempts to convert defendants' statements as to what they did not know into concessions that the statements reported by Ballew and Graham could have referred to criticism of the cross-training program. That is not what defendants said at their depositions. To the contrary, Waters testified:

> Q. Do you have any reason to disbelieve me if I told you that the substance of the conversation between Cheryl and Melanie concerned the merits of the cross-training program?
>
> A. *The only thing I can say is the only thing I'm aware of is what I have got documented, period.*

(R. 72: Waters Dep. 11/19/87, pp. 447-48) (emphasis added).

Waters documented what Graham reported, *i.e.*, that Churchill (1) "said unkind and inappropriate negative things about Cindy Waters"; (2) "had discussed her evaluation quite a bit"; (3) "stated that [Waters] had wanted to wipe the slate clean and have things get better but this wasn't possible"; (4) "stated that just in general things

were not good in OB and hospital administration was responsible"; and (5) "stated that [Davis] was ruining MDH [the Hospital]." (R. 72: Waters Dep. 11/19/87, Ex. 7; *see also* R. 72: Davis Dep. 8/28/87, pp. 286-92; Graham Dep. 9/15/87, p. 82).[1] None of this referred to cross-training, and none of it was protected under *Connick*.

Hopper and Davis also testified that all they knew or believed *at the time of Churchill's termination* (the only relevant time) was that she had said the things reported by Ballew and Graham. (R. 72: Davis Dep. 8/28/87, pp. 289-90; Hopper Dep. 1/8/88, p. 156). For example, Hopper testified:

> Q. . . . The language beginning in the last paragraph of page one of Ex. 8 [App. 75-76] [referring to cross-training]. Do you have any reason to believe that language does not refer to the conversation that she had had with the cross-trainee, Melanie Perkins-Graham?
>
> A. Yes, it doesn't say that.
>
> Q. It doesn't say that. Is there any other reason to believe that that language does not refer to what she was talking to the cross-trainee about?
>
> A. Yes.
>
> Q. What?
>
> A. The written report that I had from Kathy Davis regarding what Melanie Perkins Graham stated was said at that meeting.

(R. 72: Hopper Dep. 1/8/88, p. 156).

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[1] In Graham's deposition testimony, there is no mention of any discussion of cross-training. (R. 72: Graham Dep. 9/15/87; Graham Dep. 2/6/89; R. 76: Graham Dep. 9/15/87; Graham Dep. 2/6/89).

Churchill's counsel went on to ask Hopper if he understood – at the time of his deposition – "*why* [Churchill] was telling [Graham], if she did, that Kathy Davis was ruining the hospital?" (*Id.*, p. 159) (emphasis added). Hopper responded:

> A. *I don't know.*
>
> Q. Do you have any reason to disbelieve that it was in reference to the cross-trainee program . . . ?
>
> A. *I don't have any reason to believe it either.*
>
> Q. Do you have any reason to disbelieve it, yes or no?
>
> A. No.

(*Id.*, pp. 159-60) (emphasis added). Churchill never explains how this testimony satisfies her burden under *Mt. Healthy* to show that Hopper was motivated by her discussion of cross-training. To the contrary, it shows that Hopper did *not* know about Churchill's allegedly protected speech when he approved her termination.

What matters under *Mt. Healthy* is what defendants *believed*, not what Churchill says they had "no reason to disbelieve." Only what defendants believed could have motivated them, and the unrefuted evidence shows that they believed Churchill had engaged in negative, insubordinate comments about her supervisors, not informative discussion of the evils of cross-training.

2. Given Churchill's Behavior Over the Preceding Several Months, Defendants Had Every Reason *to* Believe That Churchill Was Engaging in Insubordinate Conduct.

Defendants had every reason *to* believe what they did because Ballew's and Graham's reports were consistent with a pattern of rude, insubordinate behavior in

which Churchill had been engaging for several months. This behavior was observed not only by Waters, but also by other nurses in the OB Department who reported it to Waters and Davis. (See Pet. Br. at 4-5). These nurses reported that Churchill was displaying "total disregard for authority" and disrespect for Waters – the same kind of behavior reported by Ballew and Graham. (*Id.*).

Churchill does not deny the behavior that led to her warning after the Code Pink incident. She submitted no response to this warning. Nor did she respond to her final evaluation, in which Waters described a continuing pattern of "negative behavior" that "promote[d] an unpleasant atmosphere and hinder[ed] constructive communication and cooperation."[2] (See Pet. Br. at 6-8). So when defendants received Ballew's and Graham's reports, they had every reason to believe that Churchill was continuing her negative behavior towards Waters and no reason to believe that Churchill was discussing cross-training.

3. *Connick v. Myers* Expressly Permits Termination Based on the Type of Speech Reported by Ballew and Graham.

Statements such as those Churchill reportedly made about Waters and Davis are unprotected under *Connick v. Myers*, 461 U.S. 138 (1983). The First Amendment protects public employee speech that seeks to inform others on issues of public concern. It does not protect exaggerated personal complaints about one's supervisors made to a

[2] Indeed, when Waters asked Churchill to come to her office on her last day of employment, Churchill said, "Oh Cindy not again." (R. 76: Notes of Cindy Waters 1/27/87).

co-worker because such complaints do not advance the purposes behind protection of public employee speech. They "*convey no information* at all other than the fact that a single employee is upset with the status quo." *Id.* at 148 (emphasis added).[3]

In the face of this case law to the contrary, and citing no authority in support, Churchill asserts that "62%" of the speech reported to defendants was protected.[4] She comes to this conclusion by culling from Davis's and Hopper's deposition transcripts some (but not all) of their recollections regarding Churchill's reported speech, and then asserting that five of eight statements "more

[3] Courts of appeals applying *Connick* consistently have held that an employee's negative comments about employer policies or supervisors' practices are unprotected when those comments are intended not to inform but to complain. *See, e.g., Phares v. Gustafsson*, 856 F.2d 1003, 1008 (7th Cir. 1988) (complaint about how medical records unit operated); *Zaky v. United States Veterans Admin.*, 793 F.2d 832, 839 (7th Cir.), *cert. denied*, 479 U.S. 937 (1986) (complaints about internal hospital policies); *Ekanem v. Health & Hosp. Corp.*, 724 F.2d 563, 570-71 (7th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984) (complaint about reorganization of a department at the hospital); *see also Caine v. Hardy*, 943 F.2d 1406, 1416 (5th Cir. 1991) (*en banc*), *cert. denied*, 112 S. Ct. 1474 (1992); *Kurtz v. Vickrey*, 855 F.2d 723, 729 (11th Cir. 1988); *Koch v. Hutchinson*, 847 F.2d 1436, 1447 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988); *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984); *Nathanson v. United States*, 702 F.2d 162 (8th Cir.), *cert. denied*, 464 U.S. 939 (1983).

[4] This farfetched quasi-mathematical analysis mistakenly suggests that protected and unprotected speech in the same conversation can somehow be quantified with precision and cases decided on a "winner take all" basis. In such cases, *Mt. Healthy* provides the appropriate rule of decision: The plaintiff must show that her protected speech was a motivating factor in the termination.

clearly denote policy than personal criticisms." (Resp. Br. at 22). Churchill's view is contradicted by the words of the statements themselves and the holding in *Connick*. If statements do not inform on issues of public concern (and none of the reported statements tells anyone anything about what actually was happening at the Hospital), the statements are unprotected under *Connick*. All anyone hearing these statements would know was that Churchill was unhappy with her working environment and her supervisors, issues of concern only to Churchill, not the public.

4. The "Historical Background" Here Contains No Evidence of an Unconstitutional Motive.

Courts may look to the "historical background" of a decision to determine the decisionmakers' motivation. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977). Had Churchill produced some evidence that defendants were motivated by her allegedly protected speech, the historical background of the termination would have been a proper subject of inquiry at trial. But Churchill's contention that the "historical context" (as she calls it) *alone* provides sufficient evidence of a retaliatory motive here fails because (1) the historical context she alleges is unsupported by the record; and (2) the claim Churchill makes based on her purported historical context is not before this Court.

Churchill posits that "Dr. [Thomas] Koch's [("Koch")] and Churchill's role in the controversy surrounding the [cross-training] policy led Petitioners to maintain special files on both of them in an effort to gather information and take action against them on a pretext independent of

their speech." (Resp. Br. at 27). She comes to this conclusion by citing evidence that (1) Koch criticized cross-training; (2) Hopper maintained a file on Koch; and (3) Waters maintained a file on Churchill.[5] But Churchill cites no evidence of any causal link among these unrelated facts.

There was uncontroverted evidence below that Hopper's concerns about Koch had nothing to do with Koch's occasional criticism of cross-training and everything to do with reports of his repeated abusive behavior towards patients and staff.[6] (R. 92: Supp. Aff. of Koch, Ex. 27). In 1986, Koch was the subject of an informal conference held to discuss this behavior. At Koch's request, the Hospital compiled a list of sixteen recent complaints in which he was accused of abuse of patients and staff.[7] (*Id.*). For example, Koch was accused of telling a mother that she "killed her baby with smoking – that the baby was better off dead"; calling a patient a "slut, whore, etc."; referring to a patient as a "piece of shit" even though he was

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[5] Waters maintained files on *all* the employees she supervised. (R. 76: Waters Dep. 11/18/87, p. 126).

[6] In her brief, Churchill suggests that Hopper's discussions of Koch with the administrative head of OB and medical chief of staff had something to do with Koch's criticism of staffing policy. (Resp. Br. at 5-6). There is no record evidence to support this assertion. To the contrary, Hopper testified that he was concerned about Koch's inability to control his temper at the meeting on August 21, 1987. (R. 76: Hopper Dep. 7/12/88, pp. 24, 35). At the meeting, Koch was "yelling" and "pounding on the table." (*Id.*, p. 24). "His carotid vessels were standing out. His eyes were bulging." (*Id.*, p. 35).

[7] Koch had explanations for all these incidents, but he could not deny that the behavior in question was reported to Hopper.

standing in an area where he could be overheard by patients; and pushing, slapping, and physically abusing a patient's spouse, a staff member and a patient. (*Id.*).

No reasonable jury could find all this was made up to mask an attempt to punish Koch because of his criticism of cross-training – especially when there is *no* evidence that any of the Hospital's decisionmakers reacted negatively to *anyone's* criticism of cross-training.[8] To the contrary, the unrefuted evidence shows that Hospital administrators encouraged debate about cross-training, even holding meetings for the purpose of discussing this and other staff concerns, and responded to criticism by making changes.[9] (R. 76: Hopper Dep. 7/12/88, pp. 152, 156-58, 159-60; Davis Dep. 8/27/87, p. 55; Waters Dep. 11/18/87, pp. 184-89; Welty Dep. 4/6/89, p. 207).

As for Churchill's "role in the controversy," she had none. There is no evidence that Waters or any of her superiors ever perceived Churchill as a "vocal critic" of cross-training. (*See* Pet. Br. at 7). Apparently acknowledging this, Churchill says "it was Churchill's professional and personal friendship with Dr. Koch" that led to her termination. (Resp. Br. at 26). But any claim by Churchill

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[8] Indeed, nowhere in her brief does Churchill suggest even one reason why they would do so.

[9] Churchill concedes that the Hospital "tolerated criticism of cross-training." (Resp. Br. at 26). She asserts that one (and only one) person was "reprimanded" for criticizing cross-training, but the record contradicts her. Nurse Janet Sullivan testified that when she discussed her criticism of cross-training with Hopper and Davis, "I didn't feel like they were mean to me or anything. They were very polite and informal, you know, tried to be helpful. They tried to make me feel comfortable." (R. 76: Sullivan Dep. 10/12/88, p. 20. She also testified that they made "changes for the better" in response to her concerns. (*Id.*).

that she was terminated because of her association with Koch is not before this Court. At issue here is Churchill's claim in Count I of her Complaint that she was fired for her allegedly protected speech on January 16, 1987. (R. 146: Third Amended Complaint, Count I, ¶ 14). Her claim that she was fired because of her association with Koch was the subject of Count V, which was dismissed pursuant to Rule 12(b)(6), a dismissal affirmed by the court of appeals. (App. 10 n.6). This claim cannot be resurrected here.[10]

5. Retaliatory Intent – Not "Deliberate Indifference" – Is the Appropriate State-of-Mind Requirement.

Contrary to *Mt. Healthy's* holding, Churchill suggests that defendants can be held liable here even if they had no intent to retaliate against her because of her protected speech. She suggests that this Court ignore *Mt. Healthy* and borrow the "deliberate indifference" standard from cases involving (1) municipal liability for employees' constitutional violations and (2) cruel and unusual punishment under the Eighth Amendment. (Resp. Br. at 31-34).[11]

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[10] *See Day v. Moscow*, 955 F.2d 807, 811-12 (2d Cir.), *cert. denied*, 113 S. Ct. 71 (1992).

[11] Churchill says defendants were "deliberately indifferent" to her First Amendment rights because Davis chose not to interview Churchill before deciding to terminate her. Davis made this decision because she "felt like [she] had enough information" after Graham confirmed Ballew's account of Churchill's comments and gave additional details of the conversation. (R. 76: Davis Dep. 8/28/87, p. 321; Davis Dep. 6/6/89, pp. 110-11). Given the several reports of Churchill's earlier insubordination Davis had received from Waters and the other

Churchill first relies on *Canton v. Harris*, 489 U.S. 378 (1989). But *Canton* employed the "deliberate indifference" standard to determine whether a municipality will be held liable for constitutional wrongs committed by its employees. *Id.* at 388 n.8. It had nothing to do with whether a constitutional wrong was committed in the first place. *Id.; see also Ware v. Unified School Dist. No. 492*, 902 F.2d 815, 819 n.2 (10th Cir. 1990).

Churchill also attempts to borrow from *Estelle v. Gamble*, 429 U.S. 97 (1976). Under *Estelle* and similar cases, public officials may be held liable for cruel and unusual punishment under the Eighth Amendment when they deliberately choose a course of action which is indifferent to the medical needs of a prisoner. *Id.* at 104. Such cases involve a type of affirmative duty to the plaintiff not present here. Defendants did have a duty, by virtue of their offices, to remove from the Hospital any employee whose conduct, they reasonably believed, threatened the Hospital's mission. To the extent the First Amendment was implicated because speech was involved, *Connick* and *Mt. Healthy* provide the rules of decision. There is no need to borrow principles from cases involving quite different concerns.

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nurses, her conclusion was reasonable. She was under no constitutional obligation to investigate further. Hopper did ask Churchill for her version of the conversation during her grievance meeting with him. (R. 76: Churchill Dep. 3/2/89, p. 418; App. 75-77). This, combined with defendants' three interviews of Ballew and interview of Graham belie any assertion that defendants were "deliberately indifferent" to what Churchill said. More importantly, the information they gathered was sufficient to form a reasonable belief that Churchill had engaged in conduct for which *Connick* permitted her termination.

6. A Rule of Strict Liability Without Regard to Motive Cannot Be Reconciled with This Court's Approval of Limitations on Public Employee Speech.

Churchill's amici would hold public employers strictly liable – regardless of their motive – whenever a conversation including some protected speech leads in some way to an employee's discharge. For support, they rely on cases involving prior restraint or other direct impingements on the right of the citizenry to speak freely.[12] These cases do not apply here, where the speech in question had already taken place before the government acted, and where the right to speak must be balanced against the government's right to manage its workplace. "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).[13]

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[12] *See* Brief for the National Education Association, *et al.* ("NEA Br.") at 4-8.

[13] It is immaterial that Churchill claims to have engaged in protected speech "along with" the unprotected speech reported by Ballew and Graham. If the First Amendment permits punishment of particular speech, then the government may punish without fear that its action may have the effect of chilling protected speech. *Alexander v. United States*, 113 S. Ct. 2766, 2773-74 (1993). Under *Connick*, a public employee who engages in the type of speech reported by Ballew and Graham risks termination. She does not somehow insulate herself from punishment by discussing issues of public concern during the same shift. *See Mt. Healthy*, 429 U.S. at 285-86.

The notion that a public employer may be held strictly liable in a case such as this, regardless of its motive, cannot be reconciled with *Connick's* express approval of termination when the employer has a "reasonable belief" that its employee has engaged in conduct unprotected by the First Amendment. 461 U.S. at 154.[14] Churchill's amici suggest that an employer's reasonable belief should control only when it is "borne out by the facts," *i.e.*, when the trier of fact agrees with it. (NEA Br. at 10). Such a rule would substitute the judgment of judge or jury – made months or years after the fact – for that of the employer who must act on the spot. If an employer reasonably believes one employee's word over another's, that belief should not be subject to judicial second-guessing. When, as here, the employer has formed a reasonable belief that the speech in question is unprotected, the constitutional inquiry under *Mt. Healthy* and *Connick* ends – because there is no impermissible motive.

B. The Hospital's Interests in Maintaining Discipline and Eliminating Disharmony Outweighed Churchill's Interest in Making Critical Comments to Graham.

Churchill suggests that the *Pickering* balance should be decided in her favor because there is no evidence of

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[14] Once a constitutionally permissible motive for punishing speech is recognized, it cannot be said that motive is irrelevant. *See Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion). Nor can imposition of liability without an impermissible motive be squared with this Court's admonition that "we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.' " *Daniels v. Williams*, 474 U.S. 327, 330 (1986) (quoting *Parratt v. Taylor*, 451 U.S. 527, 548-49 (1981) (Powell, J., concurring)).

"actual disruption" in this case. (Resp. Br. at 42). That is simply not true. Churchill confuses disruption during her shift on January 16, 1987, with the more important interests *Connick* seeks to protect. *Connick* allows an employer to consider its "need to maintain discipline or harmony among co-workers" and "need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence." (App. 16-17). *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570-73). Defendants believed Ballew's report that Churchill was deliberately attempting to dampen the enthusiasm of Graham.[15] Waters testified that Churchill's reported comments were "the straw that broke the camel's back."[16] (R. 72: Waters Dep. 11/19/87, p. 436). The Hospital was privileged to terminate Churchill rather than suffer the effects of disharmony between these two nurses.

C. Defendants Were Under No Constitutional Duty to Provide Churchill with a *Loudermill* Due Process Hearing.

Churchill here resurrects the "First Amendment due process" claim that was rejected in both courts below. In

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[15] Churchill concedes that if she had succeeded in dampening Graham's enthusiasm, "the *Pickering* factors on summary judgment might tip in favor of the Petitioners." (Resp. Br. at 43). But whether she was successful or not is irrelevant under *Connick*, which permits an employer to act *before* the employee's conduct has an adverse effect on the employer's operations. 461 U.S. at 151.

[16] This was especially true in light of Churchill's reported comment that a fresh start to their relationship "wasn't possible." (R. 72: Waters Dep. 11/19/87, Ex. 7; *see also* R. 72: Davis Dep. 8/28/87, p. 292; Graham Dep. 9/15/87, p. 82).

her brief, "Churchill agrees that if the belief an employer forms supporting its adverse personnel action is 'reasonable,' an employer has no need to investigate further." (Resp. Br. at 39). Nevertheless, she contends that before an employer may act on reports of speech such as those received here, it must provide an employee like Churchill (who had no property interest in continued employment)[17] a due process hearing that meets the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Churchill's position finds no support in the Constitution or this Court's First Amendment cases, and it runs contrary to *Mt. Healthy* and *Connick*.[18]

Churchill relies exclusively on cases involving direct regulation of speech. This Court rejected an argument similar to Churchill's in *Board of Regents v. Roth*, 408 U.S. 564 (1972), in which the Court held a due process hearing is not required "as a *prophylactic* against non-retention decisions improperly motivated by exercise of protected rights." *Id.* at 575 n.14 (emphasis in original).[19] When, as

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[17] *See* App. 70.

[18] If, as Churchill now contends, defendants somehow violated the First Amendment by failing to conduct a *Loudermill* hearing, the Hospital cannot be held liable because such a violation would have been contrary to, not mandated by, Hospital policy. As the district court correctly found in disposing of Churchill's due process claim, "the hospital's policy *requires* supervisors to provide [employees] notice and an opportunity to present their case and discuss their point of view." (App. 72) (emphasis added). In her brief, Churchill makes no argument to the contrary.

[19] The Court found inapposite the same authority cited by Churchill. *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); Monaghan, *First Amendment "Due Process"*, 83 Harvard L. Rev. 518 (1970)).

here, a public employee's conversation allegedly contains both protected and unprotected speech, only the unprotected portion of the speech is reported to the public employer, and the employer reasonably believes retention of the employee will impair governmental functions, there is no constitutional requirement for a hearing of any sort before the employer may act. *Connick*, 461 U.S. at 154.

II.

THE INDIVIDUAL DEFENDANTS ARE IMMUNE FROM LIABILITY BECAUSE THEY DID NOT VIOLATE CONSTITUTIONAL PRINCIPLES THAT WERE CLEARLY ESTABLISHED IN LIGHT OF THEIR REASONABLE BELIEF AT THE TIME THEY ACTED.

The individual defendants cannot be held liable here because they did not violate any "legal rules that were 'clearly established' at the time" they acted. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). Churchill's suggestion that her version of the law here was "clearly established" depends entirely on cases that have nothing to do with retaliatory discharge. (Resp. Br. at 44-46). No case, in 1987 or now, required that defendants do more than they did here before deciding to terminate Churchill.

The "objective legal reasonableness" of a public official's actions must be evaluated based on the information possessed by the public official at the time he or she acted. *Anderson*, 483 U.S. at 641. If the individual defendants "could have believed" that their actions were lawful, they cannot be held liable. *Id.*; *see also Hunter v.*

Bryant, 112 S. Ct. 534, 537 (1991) (per curiam). A reasonable official reading *Connick* and its Seventh Circuit progeny in 1987 could have believed (indeed, should have believed) that "unkind and inappropriate negative things about" a supervisor, discussions of an employee's evaluation, statements of irreconcilable differences with a supervisor, complaints about a bad working environment created by "administration," and statements that a hospital vice president is ruining the hospital were not protected under the First Amendment. No case instructed Hopper, Davis and Waters that they could not act based on reports of speech such as this until they provided Churchill with a *Loudermill* hearing. Accordingly, the individual defendants are immune from liability.

III.

THE HOSPITAL CANNOT BE HELD LIABLE BECAUSE THE CONSTITUTIONAL VIOLATION ALLEGED BY CHURCHILL WOULD HAVE BEEN CONTRARY TO, NOT MANDATED BY, HOSPITAL POLICY.

The only unconstitutional policy alleged by Churchill in her complaint did not exist. Churchill was not fired pursuant to a policy "requiring that all employees of the Hospital . . . who criticize Hospital policy, do so only by directing such criticism to supervisory personnel." (R. 146, pp. 6-7). The statements by Hopper and Magin upon which Churchill relies do not support the claimed policy.[20]

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[20] Hopper testified that Churchill's statements to Graham which were critical of her supervisors should have been made to those supervisors, not to a cross-trainee whom she should have been encouraging to work in the OB Department. (R. 72: Hopper Dep. 3/16/88, p. 63). Magin was responding to a hypothetical question about how she would respond to criticism of *her* by one of her subordinates, not "criticism of hospital policy." She said she "would prefer that [the employee] bring the matter directly to my attention. That's what we encourage employees to do is go to their supervisor." (R. 143: Magin Dep. 11/20/87, p. 71). There is nothing unconstitutional about telling employees they should not criticize their supervisors in front of co-workers. *See Connick*, 461 U.S. at 148-49; *Pickering*, 391 U.S. at 572 n.4.

Churchill says the Hospital is liable for Hopper's approval of the decision to terminate Churchill because his decision was "final." But the mere fact that Hopper was the final decisionmaker does not mean that his decision subjected the Hospital to liability. The policy "developed and maintained" by Hopper and approved by the Hospital's board of directors encouraged employees to speak freely about Hospital-related concerns.[21] Hopper's single alleged deviation from this policy cannot result in municipal liability. *See St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion).

[21] *See* Pet. Br. at 47-48.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in petitioners' opening brief, petitioners request that this Court reverse the judgment of the court of appeals.

Respectfully submitted,

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(L)

No. 92-1460

In the Supreme Court of the United States

OCTOBER TERM, 1993

CYNTHIA WATERS, ET AL., PETITIONERS

v.

CHERYL R. CHURCHILL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a public employer violates an employee's First Amendment rights when it fires the employee based on reports that the employee engaged in insubordinate speech involving purely personal matters.

2. Whether the individual petitioners are entitled to qualified immunity for their role in respondent Churchill's discharge.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The questions presented in this case concern the First Amendment rights of public employees and the individual liability of public officials for alleged violations of those rights. As the nation's largest public employer,[1] the United States has a substantial interest in both questions.

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[1] See U.S. Dep't of Commerce, Economics and Statistics Administration, Bureau of the Census, *Statistical Abstract of the United States: 1992*, at 305 (112th ed.) (reporting 3.1 million federal civilian employees).

STATEMENT

Petitioner McDonough District Hospital, a municipal hospital in Macomb, Illinois, fired respondent Cheryl Churchill, a nurse in the hospital's obsetetrics department, because of a conversation she had at work with a fellow nurse. The conversation, as reported to hospital officials by a third person who overheard it and by the nurse to whom Churchill had spoken, involved criticism of Churchill's superiors and the way in which the obstetrics department was run. After Churchill was fired, she sued the hospital and several of its officials in federal court under 42 U.S.C. 1983, claiming that her discharge violated the First Amendment. The district court granted summary judgment in favor of the defendants (petitioners here). The Seventh Circuit reversed and remanded.

1. Churchill began working at McDonough District Hospital in October 1982; she was assigned to the obstetrics department of the hospital and remained there until she was discharged in January 1987. In April 1986, the hospital hired petitioner Kathleen Davis as the Vice-President of Nursing. Soon thereafter, Davis instituted a "cross-training" policy, under which nurses from one department could work in another department when the department to which they were usually assigned was overstaffed. "The institution of this new policy * * * trigger[ed] a certain amount of controversy and discussion among medical and nursing staff." Pet. App. 32; see also *id.* at 1-3.

One critic of the cross-training policy was Churchill. She complained about it to, among other people, Davis and petitioner Cynthia Waters, the Supervisor of Nursing in the obstetrics department and Churchill's immediate boss. See Resp. C.A. App. 52-53. Churchill believed that the policy threatened

patient care because it was designed not to train nurses, but to cover staff shortages. Pet. App. 3.

Another critic of the cross-training policy was respondent Thomas Koch, M.D., the clinical head of the obstetrics department. Even before the policy was initiated, Koch and the hospital had been involved in a staffing dispute. Specifically, in 1982, Koch had blamed understaffing in the obstetrics department for a baby's being stillborn. Respondents Koch and Churchill later became allies in their criticism of the cross-training policy. Pet. App. 3-4.

In August 1986, Dr. Koch instituted a "code pink" in the delivery room of the obstetrics department to perform an emergency Caesarean section. He initially instructed Mary Lou Ballew, a probationary employee, to help him alert other hospital personnel to the emergency. Because Ballew failed to follow the necessary procedures, Koch had to do so himself, aided by Churchill. Before the "code pink" ended, Waters came into the delivery room and told Churchill to go check on a patient. In response, Churchill said to Waters something like "You don't have to tell me how to do my job." Dr. Koch later reproved Waters for sending Churchill out of the delivery room while the code pink was still in effect. Waters, in turn, issued a written warning to Churchill based on her "insubor'inate[e]" remark to Waters. Pet. App. 4-5, 32-33.

In December 1986, Churchill received a written evaluation from Waters stating that Churchill's attitude toward Waters "promotes an unpleasant atmosphere and hinders constructive communication and cooperation." Pet. App. 6. The evaluation also stated that Churchill "exhibits negative behavior towards me [*i.e.*, Waters] and my leadership through her actions

and body language." *Id.* at 2. The evaluation indicated that Churchill's work was otherwise satisfactory. See Resp. C.A. App. 136-140.

The conversation that precipitated Churchill's discharge occurred on January 16, 1987. On that date, Churchill had a 20-minute discussion with Melanie Perkins-Graham, a cross-trainee who was considering transferring to the obstetrics department. The conversation took place in the "break-room" where the nurses in the department ate dinner. According to Churchill, the conversation primarily concerned the cross-training policy. In addition to criticizing the policy, however, Churchill criticized Kathy Davis, saying that her staffing policies threatened to "ruin" the hospital because they "seemed to be impeding nursing care." Pet. App. 6. When Perkins-Graham said that Waters had a reputation for being difficult to work with, Churchill said (according to Churchill) that Waters was merely moody at times because of her job. *Id.* at 8.

Part of the conversation was overheard by Mary Lou Ballew while standing at the nurses' station next to the break-room. A few days later, on January 22, 1987, Ballew reported to Waters (according to Waters' notes) that Churchill took "the cross trainee into the kitchen for a period of at least 20 minutes to talk about [Waters] and how bad things are in OB [obstetrics] in general." Pet. App. 6 (quoting Waters' notes, reproduced at C.A. Supp. App. 67); see also C.A. Supp. App. 60 (deposition of Ballew) ("I told [Waters] * * * that we had had a cross-trainer down and [Churchill] had talked to her about the problems in the department to the point where the cross-trainer wasn't interested in working here any more.").

On January 23, 1987 (again according to Waters' notes), Waters told Davis what Ballew had reported. C.A. Supp. App. 220. Davis and Waters met with Perkins-Graham to confirm the report. During that meeting, Perkins-Graham "stated that [Churchill] had indeed said unkind and inappropriate negative things about Cindy Waters." C.A. Supp. App. 228 (Waters' notes). Perkins-Graham also said that Churchill claimed to have told Waters everything Churchill was saying to Perkins-Graham. *Ibid.* According to Perkins-Graham, Churchill said that Waters had discussed Churchill's evaluation with her, and that Waters "wanted to wipe the slate clean * * * but [Churchill said to Perkins-Graham that] this wasn't possible." *Ibid.* Further, Churchill told Perkins-Graham "that just in general things were not good in OB and hospital administration was responsible." Churchill specifically mentioned Davis, stating that Davis "was ruining MPH." *Id.* at 229. At the end of the meeting, Perkins-Graham told Waters and Davis that "she [Perkins-Graham] knew that we [Waters and Davis] could not tolerate that kind of negativism." *Ibid.*

On January 26, 1987 (still according to Waters' notes), Waters met with Ballew a second time "for confirmation" of Ballew's initial report. C.A. Supp. App. 67. On this second occasion, "[Ballew] stated [Churchill] was knocking the department. * * * [Ballew] said just in general [Churchill] was saying what a bad place this is to work (meaning OB)." *Id.* at 67-68. In addition, Ballew "[s]aid she heard [Churchill] state [Waters] was trying to find reasons to fire her." *Id.* at 67. Ballew also reported that Churchill described a patient complaint for which Waters had wrongly blamed Churchill. *Id.* at 67-68.

Also on January 26, 1987, Davis reported to petitioner Stephen Hopper, president of the hospital, that "a staff person in OB became upset when she heard Cheryl [Churchill] tearing down the department." C.A. Supp. App. 79 (deposition of Davis); see also *id.* at 109-112, 124-137 (deposition of Hopper). Hopper decided that Churchill should be fired, based upon Davis's report and Waters' notes of her meetings with Ballew and Perkins-Graham. *Id.* at 108 (deposition of Hopper).

On January 27, 1987, Waters and Davis met Churchill as she was coming into work and told her that she was fired. According to Churchill's contemporaneous notes, Davis said:

> [I]t had recently been brought to [Davis's] attention that [Churchill] was continuing to exhibit negative behavior in the department and that [Churchill] had been reported by someone to have had a conversation lasting fifteen to twenty minutes with a cross trainee who had been assigned to OB for a particular evening shift. [Davis] declined to identify the date of the incident, or the name of the person with whom [Churchill] was supposed to have talked even though [Churchill] asked her. [Davis] replied by telling [Churchill] that [Churchill's] conversation was reported as being non-supportive of the department and of its administrative leadership. Because of that, [Davis] said [to Churchill], "We are going to have to terminate you."

C.A. Supp. App. 41. Churchill responded by "voic-[ing] some of [her] concerns * * * about the inadequate staffing in O.B. and [saying that she] thought they were more interested in correct number coverage rather than skilled coverage. * * * At that point [Davis] interrupted [Churchill] by saying that if that were the case then [Churchill] should have been talking to [Waters] and [Davis] about it. [Churchill] informed [Waters and Davis] that [she] had talked to [Waters] about it before." *Id.* at 42 (Churchill's notes). Compare *id.* at 81 (deposition of Davis) ("I basically advised Cheryl [Churchill] that she was overheard * * * with the disparaging remarks * * * her disparaging remarks in tearing down the department"; Davis told Churchill that she was being fired because of "her general insubordination, her general attitude and her tearing down the department, her just negative influence on the department.").

Churchill filed a grievance with Hopper and met with him on February 6, 1987. According to Churchill's notes on the meeting, Hopper asked her to discuss (1) the "code pink" incident; (2) the December 1986 evaluation in which Waters made negative comments about Churchill's attitude; and (3) "the incident regarding [Churchill's] talking about [Waters] and [Davis], with negative overtones one evening while working in OB with a cross-trainee." Pet. App. 75. "Before discussing the specifics that Mr. Hopper outlined, [Churchill] voiced some of [her] concerns regarding the cross-trainee program * * *. Hopper just looked at [Churchill] and said he didn't want to get into that." *Id.* at 75-76. Then Churchill discussed the "code pink" incident. *Id.* at 76. Hopper ended the meeting by telling Churchill that he would review the matter. *Id.* at 77. He later sent her a letter denying her grievance. C.A. Supp. App. 48.

2. Churchill filed this action under 42 U.S.C. 1983 in the United States District Court for the Central District of Illinois against the hospital, Hopper, Davis, and Waters (petitioners here). Counts 1 and 3 of her complaint alleged that petitioners fired her in retaliation for her exercise of First Amendment rights. Count 2 claimed that the individual petitioners had deprived her of due process, and Count 4 alleged a state-law breach of contract claim against the hospital. Churchill later filed an amended complaint adding respondent Koch as a co-plaintiff and adding a fifth count, which alleged that petitioners violated the First Amendment associational rights of Churchill and Koch. Resp. C.A. App. 1-21.

In February 1990, the district court granted summary judgment in favor of petitioners on Counts 2 and 4, the due process and state-law claims. Pet. App. 51-74. With respect to the due process claim, the court held that Churchill lacked a protected property interest in continued employment and, in the alternative, that petitioners' alleged deviation from procedures that Churchill conceded satisfied due process was not cognizable under 42 U.S.C. 1983. *Id.* at 70, 72. As for the state-law claim, the court held that the employee handbook on which Churchill relied did not create contract rights. *Id.* at 73. Churchill did not appeal those holdings.

In May 1991, the district court dismissed Count 5 and granted summary judgment for petitioners on Counts 1 and 3. Pet. App. 31-50. The court held that Churchill failed to state a claim in Count 5 because the right of "expressive association" upon which she relied "is not implicated when," as here, it is alleged only that "two persons simply hold common beliefs"; plaintiffs asserting such a right are required to allege that they "join[ed] together 'for the purpose of' expressing those shared views." *Id.* at 42. The court further held that, under any of the various accounts of Churchill's conversation with Perkins-Graham, the conversation was not protected because it was "an attempt to simply air personal grievances rather than to speak out on an issue of public concern." *Id.* at 45. In any event, the court determined, even if aspects of Churchill's conversation were protected, the conversation was also "inherently disruptive * * * and justified termination." *Id.* at 49.

3. The court of appeals reversed and remanded. Pet. App. 1-29. It held, first, that "Churchill's speech is a matter of public concern when viewed in the light most favorable to [Churchill]." Pet. App. 1. It explained that "according to Churchill's version of her statements, she was speaking out on improper nurse staffing policies * * * that endangered the quality of patient care, an issue that is most certainly a matter of public concern." *Id.* at 11.

The court next addressed petitioners' argument that they could not be held responsible for violating Churchill's First Amendment rights because they were unaware of the details of the conversation that assertedly rendered it protected. Petitioners relied on *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977), which held that a public employee alleging First Amendment retaliation must "show that [the employee's] conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' "—in the employer's decision to fire or discipline the employee. The court rejected petitioners' argument. In the court's view,

under *Mt. Healthy*, petitioners' knowledge of the precise content of Churchill's conversation with Perkins-Graham was irrelevant:

> We hold that when a public employer fires an employee for engaging in speech, and that speech is later found to be protected under the First Amendment, the employer is liable for violating the employee's free-speech rights regardless of what the employer *knew* at the time of termination. If the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct, the employer runs the risk of eventually being required to remedy any wrongdoing * * *.

Pet. App. 25.

Finally, the court held that the individual petitioners are not entitled to qualified immunity. The court reasoned that "in 1987 the law was clear that the speech of public employees while at work was protected under the First Amendment if it was about matters of public concern in connection with their workplace." Pet. App. 27. The court considered it "immaterial" that the individual petitioners "were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern." *Ibid.* The court concluded that "[i]gnorance of the nature of the employee's speech * * * is inadequate to insulate officials from a § 1983 action." *Ibid.*

4. A petition for rehearing with a suggestion of rehearing en banc was denied. Pet. App. 30.

SUMMARY OF ARGUMENT

I. A. The court of appeals erred in holding that it was irrelevant whether petitioners knew that respondent Churchill's conversation involved a matter of public concern. If petitioners did not know that Churchill had engaged in protected speech, they could not have fired her because of the fact she had engaged in protected speech. If they did not fire her because she had engaged in protected speech, they did not violate her rights under the First Amendment.

B. 1. The court of appeals also erred in suggesting that a public employer has a duty under the First Amendment to investigate the details of an employee's conversation before it fires her based on reports of that conversation. An employer does not violate the First Amendment when it fires an employee in the mistaken belief that the employee has engaged in insubordinate speech involving purely personal matters. It is irrelevant whether that mistake is based on an inadequate investigation into the details of the employee's speech, or instead on the employer's decision, after fully investigating the matter, to resolve credibility issues against the employee. In either situation, the employer is not motivated by the fact that the employee has engaged in protected speech and therefore has not violated the First Amendment.

2. In our view, a different situation is presented when an employer acts with "willful blindness" to the question of whether an employee's speech is protected. In that case, by analogy to the criminal law, proof that the employer's awareness of a high probability that the speech was protected should suffice to establish the employer's knowledge of the protected status of the speech and provide a basis for inferring that

the protected speech was a motivating factor in the employee's discharge.

II. The court of appeals further erred in holding that the individual petitioners do not have qualified immunity. That holding was based on the court's mistaken view that public employers have a duty to investigate the details of an employee's speech, even if they believe that the spech was insubordinate and involved a purely personal matter. No such duty existed, much less was clearly established, at the time the individual petitioners took the alleged actions upon which respondents' claims were based.

ARGUMENT

I. A PUBLIC EMPLOYER DOES NOT VIOLATE THE FIRST AMENDMENT WHEN IT DISCHARGES AN EMPLOYEE BASED ON REPORTS THAT THE EMPLOYEE HAS ENGAGED IN INSUBORDINATE SPEECH ON A PERSONAL MATTER

A. The Court of Appeals Erred in Holding That, In a First Amendment Challenge To The Discharge of a Public Employee, It Is Irrelevant Whether the Employer Knew That the Employee Had Engaged in Protected Speech

1. This Court has made clear that the discharge of a public employee violates the First Amendment only if the discharge was motivated by the fact that the employee engaged in protected speech—*i.e.*, speech that "relat[es] to a[] matter of political, social, or other concern to the community," as distinguished from "matters only of personal interest." *Connick* v. *Myers*, 461 U.S. 138, 146-147 (1983).[2] The Court

[2] The court of appeals held that the cross-training policy that Churchill allegedly discussed in her conversation with Perkins-Graham was a matter of public concern under *Connick*, Pet. App. 10-22, and petitioners do not challenge that holding in this Court, see Pet. 11-12 n.11. We do not take a position on that question, and we believe that, for purposes of this case, this Court may properly assume, without deciding, that the cross-training policy involved a matter of public concern.

has also made clear that a public employee challenging her discharge on First Amendment grounds bears the burden of proof on that issue.

In *Pickering* v. *Board of Education*, 391 U.S. 563, 574 (1968), the Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." (Footnote omitted). That holding was based on the Court's recognition that the public has an interest "in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment" (*id.* at 573), and that "the threat of dismissal from public employment is * * * a potent means of inhibiting speech" (*id.* at 574). Thus, *Pickering* reflects a common-sense understanding that the public interest in robust debate on matters of public importance is threatened only when an employee's speech on such matters forms "the basis" for the employee's discharge. See also *Rankin* v. *McPherson*, 483 U.S. 378, 384 (1987) ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of em-

ployees' speech."); *Connick*, 461 U.S. at 144-145 ("[i]n * * * the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs").

In *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977), the Court reaffirmed that the discharge of a public employee violates the First Amendment only when the employee proves that the discharge was motivated by the fact that he engaged in protected speech. The Court held that a public school teacher bore the burden of showing "that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor'—in the Board's decision not to rehire him." *Id.* at 287, quoting *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 270-271 & n.21 (1977).

Since *Mt. Healthy*, this Court has continued to emphasize that a public employee must show that the employer was motivated by the fact that the employee engaged in protected speech. In *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), the Court described *Mt. Healthy* as holding, first, that "the plaintiff had to show that the employer's disapproval of his First Amendment protected expression played a role in the employer's decision to discharge him" and, second, that "[i]f that burden * * * were carried, the burden would be on the defendant to show * * * that he would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff for exercising his First Amendment rights." *Id.* at 403; see also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 249 (1989) (opinion

of Brennan, J., announcing judgment of the Court); *id.* at 259 (White, J., concurring).

2. In light of this Court's uniform precedents, the court of appeals erred in holding that it is irrelevant whether a public employer knows at the time of discharging an employee that the employee has engaged in speech that is protected by the First Amendment. If the employer did not know that the employee was engaged in protected speech, then it could not have been motivated by the fact that she had engaged in protected speech. Accordingly, in order for an employee to meet her burden of proof under *Mt. Healthy*, she must show that the employer knew of the aspects of the speech that are afforded First Amendment protection.[3]

The relevance of the employer's knowledge of the protected aspects of an employee's speech can be illustrated by a variation on the facts of this case. Suppose petitioners had been falsely told that Churchill used obscenities to refer to her supervisors during her conversation with Perkins-Graham. It is clear that petitioners would not have violated the First Amendment if they fired Churchill on account of their mistaken belief that she had used obscenities. Cf. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942). In that case, there would be no causal con-

[3] We do not argue that the employer must be shown to have known, as a legal matter, that the speech is afforded First Amendment protection. It is only necessary for the employee to show that the employer knew the aspects of the speech that in turn are found by a court to be protected by the First Amendment. Of course, individual defendants would be entitled to qualified immunity if the asserted First Amendment protection was not clearly established when they took the challenged actions. See pp. 22-24, *infra*.

nection between any protected portion of Churchill's conversation and her discharge. In other words, her protected conduct would not be the "motivating factor" in her discharge. Cf. *Mt. Healthy*, 429 U.S. at 287.

The result should not be different merely because the reports of Churchill's conversation led petitioners to believe that she was engaged in insubordinate speech involving "matters only of personal interest," *Connick*, 461 U.S. at 147, rather than in obscene speech. Although both types of speech may have some degree of protection under the First Amendment, see *R.A.V.* v. *St. Paul*, 112 S. Ct. 2538, 2543 (1992); *Connick*, 461 U.S. at 147, an employee's interest in engaging in either type of speech is outweighed by the government's interest "as an employer, in promoting the efficiency of the public services it performs through its employees." *Mt. Healthy*, 429 U.S. at 284, quoting *Pickering*, 391 U.S. at 568; see also *Connick*, 461 U.S. at 150 (government employer has an "interest in the effective and efficient fulfillment of its responsibilities to the public"). Because discharges motivated by the employer's belief that an employee has engaged in obscene or insubordinate speech on a personal matter do not "s[eek] to suppress the rights of public employees to participate in public affairs," *Connick* v. *Myers*, 461 U.S. at 144-145, they do not violate the First Amendment.

The court of appeals thus erred in stating that "the point of *Mt. Healthy* is the "protected conduct, rather than the public employer's knowledge of the precise content of the speech." Pet. App. 24-25 (internal quotation marks omitted). Under *Mt. Healthy*, it is not enough for an employee to show "that [her] conduct was constitutionally protected"; she must also

show that "this conduct," and not some other type of conduct or the false report of such conduct, "was a motivating factor" in the employer's decision to discharge her. When, as in this case, the employer claims that it discharged an employee because it believed that the employee had engaged in insubordinate speech on a personal matter, the employee bears the burden of proving that, to the contrary, the employer knew that she engaged in protected speech and fired her because of it.

B. The Court of Appeals Erred in Holding That a Public Employer Has a Duty Under the First Amendment To Investigate the Details of an Employee's Speech

1. The court of appeals stated that "[i]f the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct, the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental." Pet. App. 25. It is not clear from this statement whether the court believed that an employer can avoid liability if it adequately investigates an employer's speech but fails to discover the protected aspects of the speech. In any event, the court of appeals was mistaken: This Court has never construed the First Amendment to impose such procedural requirements on a public employer. The Court's decisions in this area in fact compel the conclusion that no such procedures are constitutionally mandated.

First, the imposition of procedural requirements upon public employers would conflict with the balancing approach of *Pickering* and its progeny. The balancing test reflects the principle that it is neither "ap-

propriate [n]or feasible" for courts "to attempt to lay down a general standard" for public employers, in light of "the enormous variety of fact situations in which critical statements by * * * public employees may be thought by their superiors * * * to furnish grounds for dismissal." *Pickering*, 391 U.S. at 569; see also *Rankin*, 483 U.S. at 388 ("the very nature of the balancing test * * * make[s] apparent that the [governmental] interest element of the test focuses on the effective functioning of the public employer's enterprise"); *Connick*, 461 U.S. at 150 ("The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."). As this Court explained in *Connick*:

> the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

461 U.S. at 151, quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (separate opinion of Powell, J.). In sum, this Court has strongly resisted the notion that the First Amendment requires public employers in all cases to follow "general standards" of procedure in dealing with insubordinate employees.

The adoption of such procedures, moreover, would conflict with "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Con-*

nick, 461 U.S. at 143; see also *Rankin*, 483 U.S. at 384 ("review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions"). In this case, the court of appeals suggested that the "duty to investigate" is triggered whenever a public employer takes action against an employee based on expressive conduct. Pet. App. 25; see also *id.* at 27. Yet most employment disputes, by their nature, involve some expressive conduct by the employees involved, whether the dispute arises in the public or private sector. See *Connick*, 461 U.S. at 149. This Court has made clear, however, that the First Amendment "does not require a grant of immunity for [public] employee grievances not afforded by the First Amendment to those who do not work for the [government]." *Id.* at 147. The court of appeals ignored that teaching to the extent that it adopted a procedural requirement of such broad applicability that "every criticism directed at a public official * * * [c]ould plant the seed of a constitutional case." *Id.* at 149.

The "undesirable consequences" of imposing a duty of investigation are "not necessary to the assurance of [First Amendment] rights." *Mt. Healthy*, 429 U.S. at 287. This Court stated in *Mt. Healthy* that a public employee's First Amendment rights are "sufficiently vindicated if [the] employee is placed in no worse a position than if he had not engaged in the conduct [protected by the First Amendment]." 429 U.S. at 285-286. If, as petitioners claim, they discharged Churchill without knowing that she had engaged in protected speech, then Churchill was not placed in a worse position than she would have been

in had she not engaged in the protected speech. Because Churchill would not be entitled to judicial relief under the First Amendment in the latter situation, she is not entitled to it in the former.

In sum, the First Amendment was satisfied in this case as long as petitioners did not discharge Churchill in retaliation for engaging in protected speech. *Mt. Healthy*, 429 U.S. at 283-284. From a First Amendment perspective, it does not matter whether petitioners relied solely on reports that Churchill had engaged in insubordinate, unprotected conduct or, instead, fully investigated the reports—including by interviewing Churchill—and ultimately decided to disbelieve Churchill and to believe the false reports. In either situation, petitioners would not have been motivated by her protected speech, and therefore would not have violated the First Amendment.

2. The court of appeals was apparently concerned that public employers could "avoid liability for violating employees' free-speech rights through deliberate ignorance of the content of the speech." Pet. App. 23. That concern, however, does not justify the judicial creation of a duty to investigate purportedly derived from the First Amendment. In our view, the court's concern is better addressed by analogy to the "willful blindness" (or "deliberate ignorance") principle of criminal law.

The "willful blindness" principle is reflected in the definition of "knowledge" in the Model Penal Code:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

Model Penal Code § 2.02. This Court relied on that definition, for example, in *Turner* v. *United States*, 396 U.S. 398, 416 & n.29 (1970), to hold that the defendant in that case "knew" that the heroin he possessed came from a foreign country, even if he lacked "specific knowledge of who smuggled his heroin or when or how the smuggling was done," because "he was aware of the 'high probability' " that the heroin came from a foreign country. See also *Leary* v. *United States*, 395 U.S. 6, 46 n.93 (1969); see generally Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191 (1990); *United States* v. *Ramsey*, 785 F.2d 184, 189 (7th Cir. 1986) (citing cases).

We believe that the "willful blindness" principle appropriately can be applied to First Amendment challenges by public employees. In accordance with that principle, an employee could meet her burden of proof under *Mt. Healthy* by showing that, in discharging the employee based on reports of her speech, the employer acted with awareness of a high probability that the employee's speech involved a matter of public concern. In that situation, a factfinder would be entitled to infer that the discharge was motivated by the fact that the employee had engaged in protected speech.

We emphasize, however, that such an inference would merely be a permissible, not a mandatory, one. Cf. *St. Mary's Honor Center* v. *Hicks*, No. 92-602 (June 25, 1993). Thus, proof that an employer acted with "willful blindness" to the protected status of an employee's speech would not shift the burden of proof to the employer to show that it was not motivated by the protected nature of the speech. The burden of proof would remain on the employee-plaintiff

throughout the case, consistent with the *Mt. Healthy* requirement that the employee show she was discharged "by reason of" her protected conduct. 429 U.S. at 283.[4]

II. THE INDIVIDUAL PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY FOR THEIR ALLEGED ROLE IN RESPONDENT CHURCHILL'S DISCHARGE

The court of appeals denied the individual petitioners qualified immunity based on its holding that they had a duty to investigate the details of respondent Churchill's conversation and breached that duty. Pet. App. 26-27. The court recognized that under *Anderson* v. *Creighton*, 483 U.S. 635, 640-641 (1987), courts must inquire whether the lawfulness of an official's conduct is "apparent" in light of "the circumstances with which [the official] was confronted," an inquiry which usually requires "examination of the information possessed by the * * * official[]." Nonetheless, the court of appeals did not feel obliged to conduct such an inquiry here—by considering the information possessed by the individual petitioners at the time of Churchill's discharge—

[4] Moreover, a public employer may be justified in discharging an employee for speech, even if the speech involves a matter of public concern. *Connick*, 461 U.S. at 149-154; see also *Rankin*, 483 U.S. at 388-392. To determine whether the discharge is justified, the court must balance the employee's interest in engaging in the speech against the employer's interest "in promoting the efficiency of the public services it performs through its employees," taking into account "the manner, time, and place of the employee's expression * * * [as well as] the context in which the dispute arose." *Rankin*, 483 U.S. at 388.

because in its view they "failed to conduct a thorough and impartial investigation * * * about the content of the conversation." Pet. App. 26-27. The court accordingly denied immunity based solely on its determination that "a reasonable official should have understood that what he was doing violated the employee's free speech rights if he fired her for speaking out on a matter of public concern." *Id.* at 27 (internal quotation marks and brackets omitted). The court considered it "immaterial that the [individual petitioners] were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern." *Ibid.*

The court of appeals erred in departing from the *Anderson* v. *Creighton* framework for analyzing claims of qualified immunity. Indeed, the court committed the same error as did the court of appeals in *Anderson*. In *Anderson*, the Eighth Circuit denied qualified immunity to the defendant police officer on the ground that "the right Anderson was alleged to have violated—the right of persons to be protected from warrantless searches of their home unless the searching officers have probable cause and there are exigent circumstances—was clearly established." 483 U.S. at 638. In this case, the court of appeals likewise proceeded at a highly abstract level of generality, finding it sufficient to deny qualified immunity that the right of a public employee to speak out on matters of public concern was "clearly established" at the time of Churchill's discharge. This Court rejected such an approach in *Anderson*, observing that it "would destroy 'the balance that [its] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective per-

formance of their duties,' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" *Anderson*, 483 U.S. at 639, quoting *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984).

The same consideration requires rejection of the court of appeals' approach here, without regard to the correctness of the court of appeals' suggestion that petitioners had a "duty to investigate." Even assuming this Court were now to interpret the First Amendment to impose a "duty to investigate" upon public employers in circumstances such as this, no such duty was "clearly established" (*Anderson*, 483 U.S. at 639, quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)) in 1987, when the events in this case occurred.

As we read the record, under the foregoing principles it was not objectively unreasonable for the individual petitioners to act on the basis of the information they had concerning Churchill's conversation. It appears to be undisputed that the information that the individual petitioners possessed concerning Churchill's conversation did not reveal that the conversation involved a matter of public concern. See Pet. App. 22. The information revealed, at most, that Churchill had made "unkind and inappropriate" remarks about petitioner Waters and criticized the way in which the obstetrics department was run. See pp. 2-7, *supra*. Based on that information, a reasonable official could, as a matter of law, have concluded that it was lawful to discharge Churchill for insubordinate speech. Cf. *Anderson*, 483 U.S. at 641. We therefore believe that the individual petitioners are entitled to summary judgment on grounds of qualified immunity.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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No. 92-1450

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL,
Petitioners,
v.
CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL ASSOCIATION OF COUNTIES, AND U.S. CONFERENCE OF MAYORS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a public employer whose termination decision was motivated solely by substantiated reports of unprotected, insubordinate speech can nevertheless be held liable under the First Amendment, without any judicial consideration of the public employer's legitimate need to maintain harmony in the workplace.

2. Whether, in January 1987, it was clearly established that public officials could be held liable under the First Amendment for discharging an employee based on substantiated reports of unprotected, insubordinate speech, without any judicial consideration of the public employer's legitimate interest in maintaining harmony in the workplace.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling in-

terest in legal issues that affect state and local governments. Because every state or local government is an employer, constitutional issues affecting their ability to function in that capacity are of manifest importance to *amici*.

Contrary to this Court's teachings, the decision of the court below totally ignores " 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). Unless reversed, the decision below will be extremely deleterious to the functioning of States and local governments by greatly impairing their ability to provide high quality, cost-effective services to their citizens. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT OF THE CASE

Petitioner McDonough District Hospital hired respondent Cheryl Churchill as a nurse in its obstetrics ("OB") department in October 1982. Pet. App. 2. Churchill received favorable performance evaluations through December 1985. *Id.*

In early 1986, petitioner Kathleen Davis, the Hospital's new vice-president of nursing, implemented a "cross-training" policy—a policy of training full-time nurses from general medical areas of the hospital in more specialized nursing disciplines to permit flexible staffing. Pet. App. 32. In August 1986, Churchill's immediate supervisor, petitioner Cynthia Waters, issued a written warning to Churchill for "[i]nsubordination . . . [and for her] [g]eneral negative attitude and lack of support toward nursing administration in the OB Department." Pet. App. 33. In December 1986, Waters further stated in Churchill's annual evaluation that she "exhibits negative behavior towards me and my leadership" and "promotes an unpleasant atmosphere and hinders constructive communication and cooperation." Pet. App. 2, 6.

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

On January 16, 1987, Churchill engaged a cross-trainee, Melanie Perkins-Graham, in conversation about the OB department and its practices. Pet. App. 6-7. According to Churchill, the conversation included complaints about the cross-training policy and its perceived effects on patient care. Pet. App. 6. During the same conversation, Churchill reportedly complained about Davis and Waters and about "how bad things are in OB in general." *Id.* Another nurse, Mary Lou Ballew, overheard part of the conversation and, because she believed it to be harmful to Perkins-Graham's morale, reported the conversation to Waters. *Id.* at 35. Waters, in turn, reported the incident to Davis, who met with Perkins-Graham and confirmed that Perkins-Graham had indeed understood Churchill to have made negative statements about Waters and the department. *Id.* at 6-7. Waters and Davis then met with petitioner Stephen Hopper, the President of the Hospital, and Bernice Magin, the hospital's personnel director; at this meeting it was agreed that Churchill would be terminated. Pet. App. 7.

As a consequence, on January 27, 1987, Waters and Davis met with Churchill and advised her that, because she had continued to undermine the department and the hospital administration, she was being

fired. Pet. App. 36. Churchill appealed the decision to Hopper. *Id.* Hopper sustained the discharge on the ground that Churchill's statements were insubordinate, made in an inappropriate forum, and interfered with the department's operations. *Id.*

2. Churchill brought suit alleging, *inter alia*, that she had been terminated by petitioners in retaliation for exercising her First Amendment rights—specifically, for the comments that she had made about the hospital staff and its cross-training policies. Pet. App. 37. The district court granted summary judgment to petitioners, reasoning that "[a]ll of the versions of Churchill's statements have a common denominator—all are indicative of an attempt to simply air personal grievances rather than to speak out on an issue of public concern," and that, "[a]s such, Churchill's statements are not entitled to First Amendment protection." *Id.* at 45. The court further held that, even if the speech related to an issue of public concern, "the type of criticism which Churchill voiced . . . about her superiors was inherently disruptive" of the Hospital's "need to foster healthy working relationships between an employee and her supervisors and co-workers." *Id.* at 49.

3. The court of appeals reversed because, "according to Churchill's version of her statements, she was speaking out on improper nurse staffing policies at McDonough District Hospital that endangered the quality of patient care, an issue that is most certainly a matter of public concern." *Id.* at 11. The court further held that "Churchill's interest in fulfilling her duties and obligations as an ethical, responsible professional . . . clearly outweighs the hospital's interests in interfering and ultimately

preventing her from speaking out on important matters of public concern." *Id.* at 20.

The court of appeals next rejected petitioners' argument that "they have a complete defense to Churchill's claims because, as Churchill alleges, they were unaware of the actual content of her January 16, 1987 conversation." Pet. App. 22. The court held that "the employer is liable for violating the employee's free speech rights regardless of what the employer *knew* at the time of termination." *Id.* at 25 (emphasis in original). The court also rejected the individual petitioners' claims of qualified immunity. Pet. App. 24-27.

SUMMARY OF ARGUMENT

Ignoring this Court's long line of precedents which make the legitimate needs of public employers in running a workplace central to First Amendment analysis, the court of appeals created revolutionary standards for First Amendment liability which seriously threaten the ability of public employers to function as employers. In so doing, the court below made three fundamental errors of law, each of which provides grounds for reversal.

1. First, the court of appeals erred in holding that protected speech of which an employer is entirely unaware can nevertheless form the basis for First Amendment liability. Under the court of appeals' novel approach, an employer whose termination decision is motivated solely by believable, substantiated reports of unprotected, insubordinate speech can be found liable to the terminated employee. This rule flouts this Court's decision in *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977),

which makes the motivation of the public employer in taking the termination action the key to its liability. The court of appeals' rule also defies common sense, as it would prevent public employers from making necessary personnel decisions for lawful reasons, for fear that they might have overlooked some form of protected expression later found to be intermingled with the incident prompting the adverse action.

2. Even if the protected portion of Churchill's speech could form a basis for petitioners' liability, the court of appeals clearly erred by wholly neglecting to "arrive at a balance between the interests" of the employee in speaking on matters of public concern and "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). While the court of appeals criticized the manner in which the trial court struck the *Pickering* balance, Pet. App. 17-20, it made no effort to strike its own. Instead, it substituted one-sided observations about the workplace conflict in this case for the "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public" which this Court's precedents require. *Connick v. Myers*, 461 U.S. 138, 150 (1983) (describing *Pickering*'s balancing requirement).

The court of appeals thus failed to recognize that, even where a public employee's speech touches upon a matter of public concern, a public employer may nevertheless be entitled to take an adverse employment action if, as here, the employer "reasonably believe[s] [that the speech will] disrupt the office, undermine [the employer's] authority, and destroy

close working relationships." *Connick*, 461 U.S. at 154.

3. Finally, the court of appeals erred again by holding that the qualified immunity doctrine does not protect the individual petitioners from the operation of that court's novel legal standards. This Court has repeatedly held that government officials must be shielded from liability for civil damages unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The court of appeals' refusal to extend qualified immunity to the individual petitioners cannot be squared with that standard, given the state of the law at the time of petitioners' actions.

ARGUMENT

I. THE COURT OF APPEALS' FIRST AMENDMENT ANALYSIS IGNORES THIS COURT'S PRECEDENTS, WHICH RECOGNIZE THE NEED OF PUBLIC EMPLOYERS TO TAKE DECISIVE PERSONNEL ACTION WHEN NECESSARY TO CARRY OUT THEIR PUBLIC MISSIONS

Central to this Court's constitutional jurisprudence in the public employment realm is its recognition of "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 150 (1983). The court of appeals' imposition of liability without the requisite causation, as well as its failure to accord proper deference to the employer's interest under the *Pickering* balancing analysis, squarely conflict with this Court's precedents. These emphasize the need of "the State, as an employer" to "promot[e] the effi-

ciency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

The court of appeals' decision dramatically erodes public employers' ability to make use of a management tool critical to the effective operation of any organization, whether public or private—"the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring), *quoted in Connick*, 461 U.S. at 151. "Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." *Id.*

Because the court of appeals' framework introduces the need to investigate surrounding circumstances and heightens the concern over litigation by establishing a standard which ignores the employer's legitimate interests, it will result in overly cautious and slow decisionmaking. This Court has already refused to require delay in personnel decisions where it would interfere with the employer's ability to run its workplace. *Connick*, 461 U.S. at 152 ("we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action") (footnote omitted).

Hence, the decision below would impose great costs on public employers—and, by extension, on the citizens whom they serve. Capital and human resources that would be better spent in efficiently delivering government services would instead be diverted into

investigation into matters irrelevant to the employer's personnel decision, as well as litigation over both the discharge and the investigation itself. Because the practical consequences of the decision below would undermine public employers' ability to provide high quality, cost-effective services to the public, it is essential that the serious legal errors of the court of appeals be corrected.

A. A Public Employer Does Not Violate the First Amendment When It Terminates An Employee for Reasons Unrelated to Speech About Matters of Public Concern

This Court has repeatedly emphasized that judicial superintendence of public employers' personnel decisions has specific and defined limits. Ordinary dismissals from government service are not subject to judicial review merely because the employer's reasons "may not be fair" or because they "are alleged to be mistaken or unreasonable." *Connick*, 461 U.S. at 146-47 (citations omitted).

This reflects a recognition that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies[,]" despite "the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs." *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976). Only where an unconstitutional motive is alleged is it proper for a federal court to step in and review the personnel action on constitutional grounds: "In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erro-

neous, can best be corrected in other ways." *Id.* at 350.

For these reasons, in *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), the Court held that, as a threshold matter, a public employee alleging a First Amendment violation must demonstrate that protected expression was a "substantial" or "motivating" factor in the employer's employment decision. *Id.* at 287.[2] In establishing its causation rule, which shields public employers from First Amendment liability for personnel decisions that they would have reached "even in the absence of the protected conduct," *id.*, the *Mt. Healthy* Court reaffirmed the public employer's interest in running its workplace. An employee cannot block legitimate personnel actions simply by engaging in protected conduct, the Court clarified, reasoning that protected expression should not "place an employee in a better position . . . than he would have occupied had he done nothing." *Id.* at 285. Instead, the Court held, it is enough that "an employee is placed in no worse

[2] *Accord NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983) (First Amendment violation may be found only where the employer is "motivated by a desire to punish plaintiff for exercising his First Amendment rights"); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (noting that employee must "show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech"). *See* Laurence H. Tribe, *American Constitutional Law* 815 (2d ed. 1988) (discussing need for "judicial scrutiny to detect illicit purposes" in the public employment setting and noting that "the *Pickering* rule would be empty if courts did not seek to determine whether an illicit motive had entered into a decision"). *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (motivation central to liability for gender discrimination).

position than if he had not engaged in the conduct." *Id.* at 285-86.

Despite this controlling precedent, the court of appeals' First Amendment analysis ignored motivation. Its extraordinary decision means that a public employer can be held liable under the First Amendment based on protected speech of which the employer is completely unaware and which therefore could not have motivated it to take an adverse personnel action. This accomplishes a result even more unsettling than the one the Court sought to avoid in *Mt. Healthy*: the mere possibility that an employee might have engaged in protected activity is permitted to block independently-motivated personnel decisions.

This erroneous rule exposes petitioners to liability for violating Churchill's asserted First Amendment interest in speaking out about the Hospital's cross-training policies—even though they did not know that she had done so and did not discharge her for this reason. At the time they discharged Churchill, petitioners understood only that she had made derogatory remarks about her superiors, and it is unrefuted that they chose to fire her for this unprotected speech alone. *See* Pet. Br. 29.[3] The decision of the court

[3] The derogatory comments which were reported to Churchill's superiors were clearly not of public concern and hence would not raise a First Amendment interest cognizable in federal court. *See Connick*, 461 U.S. at 147 ("when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior"). Churchill

below, however, makes petitioners liable for violating Churchill's free speech rights even though they were not aware of her protected expression at the time of the termination, much less motivated by it.

The notion that a public employer can be held liable for "accidental" violations of the First Amendment, Pet. App. 25, based on protected speech which played no part in its personnel decision, is, to say the least, unprecedented. It defies the teachings of this Court, which make the employer's motivation (and hence, by necessity, the employer's knowledge) central to its liability.

Finally, the court of appeals has created a problematic and unworkable standard for public employers. While the court disclaimed the imposition on employers of any particular "duty to investigate," *see* Pet. App. 27, its standardless approach to liability will, as a practical matter, necessitate extensive investigation on the part of employers before they take any adverse employment action. Even so, if a public employer fails to ferret out any element of protected expression that was, in fact, embedded within the insubordinate incident which prompted an adverse personnel action, the court of appeals' analysis would expose that employer to liability by virtue of its "inadequate investigation." Pet. App. 25.

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conceded below that the reports of Ballew and Perkins-Graham to Waters and Davis could be construed in such a manner. *See* Pet. Br. 29.

B. The Court of Appeals Disregarded the Public Employer's Interest In Fostering Constructive Working Relationships

Even if protected speech of which the employer is unaware can form the basis for First Amendment liability, the court of appeals erred by completely failing to balance the hospital's interest in fostering healthy working relationships between Churchill and her supervisors and co-workers against Churchill's alleged First Amendment interests.[4]

While employees clearly do not waive their First Amendment rights when they accept public employment, *see, e.g., Wieman v. Updegraff*, 344 U.S. 183 (1952), neither do they gain a license to use speech to disrupt and undermine their workplaces in a manner that would not be tolerated in the private sector. As the Court explained in *Connick*,

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[4] *Amici* here assume *arguendo* that the cross-training and hospital policy criticisms which Churchill alleges were contained within the conversation which led to her termination involve matters of public concern and therefore trigger First Amendment concerns. There is, however, reason to question whether Churchill's statements (even under her own version of the conversation) satisfy *Connick's* threshold requirement for a First Amendment interest cognizable in federal court, *i.e.*, that the speech in issue relates to "matters of public importance and concern" rather than merely to internal workplace concerns. *See* 461 U.S. at 143, 147-48. *See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (speech "solely in the individual interest of the speaker and [the speaker's] specific business audience" is not protected); Pet. App. 47 ("the form and content of those statements indicate that they were not made to educate the public (or even [the cross-trainee] for that matter) about problems in OB, but rather to air Churchill's personal feelings about her supervisors at MDH").

> Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

461 U.S. at 147; *see Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 414 (1979) ("the free speech rights of public employees are not absolute") (citing *Pickering*, 391 U.S. at 568). Hence, the Court has taken care to ensure that "the [First] Amendment's safeguard of a public employee's right, as a citizen, to participate in discussions concerning public affairs" not be "confused with the attempt to constitutionalize" ordinary employee grievances. *Connick*, 461 U.S. at 154.

Nor do public employers cede their ability to function as employers simply because of the public nature of the employment setting. Rather, the Court's constitutional analysis has given "full consideration" to "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. In *Connick*, the Court expressly grounded its holding not only in its concern with the protection of speech on matters of public concern, but also in "the practical realities involved in the administration of a government office." *Connick*, 461 U.S. at 154. And, "[w]hile as a matter of good judgment, public officials should be receptive to constructive criticism by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149.

The Court's precedents, therefore, require the judiciary "to arrive at a balance between the interests

of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. *Connick* held that even where an employee's speech relates to matters of public concern, the government's legitimate interest in " 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service' " may outweigh the employee's First Amendment interests. 461 U.S. at 150-51 (quoting *Ex Parte Curtis*, 106 U.S. 371, 373 (1882)).

Hence, the fact that an employee's speech touches on matters of public concern is, standing alone, insufficient to immunize her from personnel actions deemed necessary by the employer. As the *Connick* Court held, even where expression on matters of public concern is involved, the First Amendment does not allow the courts to "impos[e] an unduly onerous burden on the State" to justify its personnel actions. 461 U.S. at 149-50. In short, the determination of whether a public employer's interest in maintaining harmony in the workforce outweighs an employee's First Amendment interest in speaking on matters of public concern turns on a consideration of both the strength of the employee's First Amendment interest in the speech, and the manner and extent to which the speech disrupted (or threatened to disrupt) the efficiency and effectiveness of the workplace. *See id.* at 151-53.

Relevant to the strength of the employee's First Amendment interest in the speech is the degree to which it involves matters of public concern; if the employee's expression "touch[es] upon matters of

public concern in only a most limited sense," *id.* at 154, it is more easily outweighed than if it "more substantially involve[s] matters of public concern." *Id.* at 152. Here, as in *Connick*, the context in which Churchill's statements took place indicates that they were of limited public import.

Significantly, Churchill, like the employee in *Connick* (and unlike the employee in *Pickering*, *see* 391 U.S. at 566), did not seek to inform the public of any "actual or potential wrongdoing or breach of public trust." *Connick*, 461 U.S. at 148. Nor did she address any perceived legal or ethical violations to the appropriate legal or regulatory bodies. Instead, her comments were directed to a trainee, who had no authority to effectuate change. *See* Pet. App. 47 ("Churchill did not espouse her opinions to a public audience or to authorities with power to make changes in policy.")

While the First Amendment unquestionably extends to private conversations as well as public ones, *Givhan*, 439 U.S. at 414, the Court has recognized that

> [p]rivate expression . . . may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.

Id. at 415 n.4, *quoted in Connick*, 461 U.S. at 152-53.

Here, Churchill's critical statements about her superiors were far more subversive than a personal confrontation with a superior; because they were directed to a trainee, they had an even greater potential to erode authority and destroy working relationships. Churchill uttered her remarks to a trainee during working hours at the hospital, making it more likely that harmonious working relationships would be disrupted and that the functioning of the hospital would be impaired. In *Connick*, the Court similarly recognized that the fact the speech in question occurred in a workplace setting during working hours "supports [the employer's] fears that the functioning of his office was endangered." 461 U.S. at 153.

Moreover, as was the case in *Connick*, Churchill's statements arose "from an employment dispute concerning the very application of that policy to the speaker"; in such cases, the Court has held that "additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." *Connick*, 461 U.S. at 153. Churchill's comments were not made "out of purely academic interest" about hospital policy, *see id.*, but rather out of concern with the manner in which hospital policy affected her. *See* Pet. App. 47-48.

In weighing the public employer's interests, the Court has recognized that public employers have a legitimate interest in fostering harmony among coworkers and supervisors. *See Connick*, 461 U.S. at 151 ("it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors") (citation omitted); *Pickering*, 391 U.S. at 570 & n.3 (recognizing that there could be "positions in public employment in which the relationship between superior and subordinate is of such

a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship").

The importance of working relationships to the overall effectiveness of an organization has been well documented. *See* Daniel Katz & Robert L. Kahn, *The Social Psychology of Organizations* 324 (1966) ("There is ample evidence . . . that informal relationships in the work situation may be powerful enough to enhance greatly the performance of the organization or to impede substantially its ability to accomplish the formal mission.") (citing numerous studies); Hal G. Rainey, *Understanding and Managing Public Organizations* 17 (1991) ("the Hawthorne Experiments and other research underscored the importance of social and psychological factors in the workplace"). This is particularly true where, as here, the work setting requires employees to interact quickly and effectively in a broad range of situations.

A breakdown in working relationships can spell disaster for an organization's ability to function. "The presence of one incompetent or disgruntled worker can disrupt the work flow, antagonize other employees, and jeopardize whatever esprit de corps may be present." Cole Blease Graham, Jr. & Steven W. Hayes, *Managing the Public Organization* 144 (1986). While such a disruption is never desirable, it poses a particularly acute threat in a hospital setting, where employees' ability to function together effectively as a team is literally a matter of life and death. *See* Dr. Robin A.J. Youngston, *Operation!* 51 (1991) (emphasizing "the teamwork involved in the care of each patient," and noting that responsibility for any one patient "is divided amongst many different staff who then work together as a team"). *See also Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 26 (2d Cir. 1979) ("an *esprit de corps* is essential" among firefighters because "lives may be at stake"). In such a setting, the public employer's "prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch" must be given a high degree of protection. *Arnett*, 416 U.S. at 168 (Powell, J., concurring), *quoted in Connick*, 461 U.S. at 151.

The Court has, therefore, specifically ruled that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick*, 461 U.S. at 151-52. Certainly the need for close working relationships among nurses in a hospital when treating patients in the operating room and elsewhere is at least as weighty as the need for close working relationships in a District Attorney's office. *See Connick*, 461 U.S. at 151-52. Where, as here, only a limited First Amendment interest is implicated, a public employer need not "tolerate action which he reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154. Nor need a public hospital tolerate such action when the resulting disruption in the workplace carries the potential to threaten patients' lives.

In this case, petitioners were not required "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 152 (footnote omitted). Churchill's

"inherently disruptive" criticism of her superiors, Pet. App. 49, further undercut the already badly deteriorated relationship between Churchill and those superiors, *see* Pet. App. 2, 6, about which Churchill had been counselled and warned repeatedly. *See id.* at 33-34. Thus Churchill's insubordinate speech not only had the clear potential for disrupting the hospital, undermining authority, and destroying close working relationships among providers of patient care, it served to exacerbate a destructive workplace dynamic that was already well-advanced.

The need of a public hospital to respond forcefully to such destructive situations is manifest. Because the court of appeals disregarded that interest and failed to include it in its First Amendment analysis, the judgment below should be reversed.

II. THE COURT OF APPEALS MISAPPLIED THE QUALIFIED IMMUNITY DOCTRINE

The Court has long recognized the substantial social costs which litigation imposes on government officials.[5] Accordingly, the Court has repeatedly held that government officials retain a qualified immunity from damages suits unless their conduct violated

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[5] As the Court explained in *Harlow v. Fitzgerald*,

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

"clearly established statutory or constitutional rights of which a reasonable person would have known."[6] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is not enough, however, for a plaintiff seeking to overcome a qualified immunity defense merely to assert the denial of a right in its most generalized sense. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). Public officials must be "reasonably [able to] anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Accordingly, the Court has admonished that:

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (internal citation omitted). *See also Davis*, 468 U.S. at 190.

Viewed against these standards, it is clear that the court of appeals erred in denying the individual petitioners' qualified immunity defense. To be sure, at the time of respondent's discharge this Court had recognized that, in some circumstances, the dismissal of an employee for speaking on "a matter of legitimate

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[6] The Court has expressly recognized that supervisory officials in public hospitals are entitled to qualified immunity. *See Siegert v. Gilley*, 111 S.Ct. 1789, 1791-93 (1991); *O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975).

public concern" could violate the First Amendment. *See Pickering*, 391 U.S. at 571-72. The Court had, however, expressly declined in *Pickering* and *Connick* to adopt so sweeping an approach as to make *any* dismissal where an employee has spoken on a matter of public concern constitutionally impermissible. As the Court emphasized in *Pickering*:

> Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

391 U.S. at 569.

This Court's own recognition of the difficulty of articulating a clear rule in the area is reason enough to reverse the court of appeals. Certainly one cannot expect medical personnel, who as a general matter have neither training nor experience in the law, to understand the intricacies of *Pickering*'s balancing test. Indeed, it bears emphasis that in this case the district court ruled in favor of petitioners on the First Amendment question based on recent Seventh Circuit precedents, *see* Pet. App. 46-48 (collecting cases); it is highly problematic to demand greater sophistication about subtle and amorphous constitutional doctrines from medical personnel than from experienced members of the federal judiciary.[7] As the Seventh Circuit itself has noted:

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[7] The court of appeals' holding—"that ignorance of the nature of the employee's speech . . . is inadequate to insulate officials from a § 1983 action," Pet. App. 27—represented a novel development in the Seventh Circuit's case law which was not apparent under the legal landscape existing at the time of respondent's discharge. *Cf. Elliott v. Thomas*, 937 F.2d 338, 344-46 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1242 (1992) (noting "[t]he inquiry [in a retaliatory transfer case] must focus on what the defendants knew"; "[t]he state of the law on mixed-motive transfers was in 1987—and remains—sufficiently ambiguous" as to entitle defendants to immunity).

> [T]he particularized balancing required by *Pickering* is difficult even for the judiciary to accomplish. Therefore, while it may have been clear since 1968 that a citizen does not forfeit his First Amendment rights entirely when he becomes a public employee, the scope of those rights in any given factual situation has not been well defined.

Benson v. Allphin, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986).

In any event, the Court's post-*Pickering* cases provide no support for the Seventh Circuit's conclusion that "'a reasonable official [sh]ould [have understood] that what he [was] doing violate[d]' the employee's free speech rights if he fired her for speaking out on a matter of public concern." Pet. App. 27 (*quoting Anderson*, 483 U.S. at 640). In *Mt. Healthy*, for example, the Court held that even if "protected conduct played a 'substantial part' in the actual decision . . . [it] would not necessarily amount to a constitutional violation justifying remedial action." 429 U.S. at 285. The Court, sensitive to the complexities of the employment relationship, thus held that if the employer would have reached the same decision "even in the absence of the protected conduct," it had not violated the First Amendment. *Id.* at 287. And in *Connick*, the Court recognized that even when employee speech involves a

matter of public concern, the First Amendment does not require that the employer "tolerate action which he reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships." 461 U.S. at 154.

As both *Mt. Healthy* and *Connick* demonstrate, the court of appeals focussed on the alleged constitutional violation at too great a level of generality in its qualified immunity analysis. If, under *Mt. Healthy*, public officials do not violate the First Amendment even when "protected conduct play[s] a 'substantial part' in the actual decision" if the discharge decision would have been made "even in the absence of the protected conduct," 429 U.S. at 285-87, then surely it cannot be said that "the unlawfulness" of a discharge decision made by a public official who is unaware of an employee's protected speech is "apparent" under "pre-existing law." *Anderson*, 483 U.S. at 640.[8] In these circumstances, the individual petitioners could not "reasonably . . . anticipate [that] their conduct [might] give rise to liability for damages," *Davis*, 468 U.S. at 195; they must, therefore, be protected from liability by the qualified immunity doctrine.

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[8] Indeed, it appears that at the time of respondent's discharge, the only court of appeals decision on the issue had held that an employer has no duty under the First Amendment to investigate the circumstances surrounding an employee's alleged insubordinate speech to determine if it addressed matters of public concern. *See Atcherson v. Siebenmann*, 605 F.2d 1058, 1064 (8th Cir. 1979).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 92-1450

(9)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, AND McDONOUGH DISTRICT HOSPITAL, AN ILLINOIS MUNICIPAL CORPORATION,
Petitioners,

v.

CHERYL R. CHURCHILL AND THOMAS KOCH, M.D.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN NURSES ASSOCIATION IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Nurses Association (hereinafter ANA) respectfully moves this Honorable Court for leave to file the attached brief *amicus*. The attorneys for all respondents appearing in this case have consented to such filing. The attorney for Petitioner has declined to give such consent.

ANA is the only full-service professional organization representing the nation's 2.2 million Registered Nurses through its 53 constituent associations. ANA advances the nursing profession by fostering high standards of nursing practice, promoting the economic and general welfare of nurses in the workplace, projecting a positive and realistic view of nursing, and by lobbying the Con-

gress and regulatory agencies on health care issues affecting nurses and the public.

The First Amendment issue before the Court will have major implications on nursing practice in government or municipal health care settings. The right to criticize hospital policies which may impact the general public is an issue which has been addressed by this Court in prior proceedings. Nurses and other health care professionals are the best individuals to ascertain the necessity and proficiency of hospital policies and procedures which will directly effect patients and other individuals of the public sector. ANA has a vested interest in ensuring the equitable treatment of its constituents within the public and private health care industry. The grant of certiorari by the Court in this case emphasizes the national significance of the Court addressing the questions related to nursing and all health professionals.

The brief submitted with this motion will concentrate on the peculiar facts of this case as well as the national industry and professional standards of the nursing profession. In the brief tendered with this motion, ANA specifically defines and illustrates "floating" and "cross-training". While ANA explains these practices it also contrasts the procedures illustrating the necessary training required for cross-training, and the lack thereof with floating. These practices are performed nationally by hospitals in conjunction with its nursing staff and administrators. To elucidate these practices will enable the Court to better grasp the complex nature of the practice complained of, which in turn will allow the Court to understand the implications such criticism will have on the general public. Moreover, ANA will address public speech in the health care setting, particularly when the speech is communicated in a government or municipal hospital milieu. These are the major issues before the bench; ANA is submitting the attached brief in support of the Respondents and to explain issues before the Court in which ANA has recognized expertise.

WHEREFORE, it is respectfully prayed that this Motion for Leave to File the annexed brief *amicus curiae* be granted.

Respectfully submitted.

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QUESTIONS PRESENTED BY THE AMERICAN NURSES ASSOCIATION

1) Whether the "cross-training" program implemented by McDonough District Hospital provided care consistent with professional standards of nursing practice.

2) Whether an employer can terminate a registered nurse for communicating statements directly related to professional standards, quality of care, and the profession's ethical standards.

3) Whether a public employer can terminate an employee for communicating statements which were later discovered to be protected speech in the public interest.

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN NURSES ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMERICAN NURSES ASSOCIATION

The questions presented in this case are relevant to the profession of nursing. One of the underlying issues—petitioner's "cross-training" policies—reaches the core of nursing practice. This policy represents a controversial approach to health care, which is often utilized without adequate review or consideration of its consequences. The American Nurses Association ("ANA") is the national federation of registered nurses comprised of 53 state and territorial constituent organizations representing approximately 2.2 million nurses who have an interest in adher-

ence to professional standards designed to protect patients and enhance nursing care.

ANA develops policies and professional standards of practice which are utilized by registered nurses throughout the United States. The state nurses associations ("SNAs") have extensive involvement in developing the national policies and standards of the nursing profession.

STATEMENT OF THE CASE

The respondent, Cheryl Churchill ("Churchill"), was a registered nurse employed at McDonough District Hospital ("Hospital"), a public hospital in Macomb, Illinois. Churchill began working at the Hospital in October 1982. During her tenure at McDonough she was assigned to the Obstetric Department of the Hospital.

In April 1986, the Hospital hired Kathleen Davis ("Davis") as the Vice-President of Nursing. Sometime in 1986 Davis instituted a "cross-training" policy. Cross-training usually allows health professionals to develop proficiency in a new area of practice. A properly designed cross-training program requires a nurse to receive adequate training and instruction so that new duties and tasks are performed safely and effectively. However, this cross-training was not implemented in this fashion. Instead, the cross-training policy developed by Davis called for nurses from one department, when over-staffed, to work an under-staffed department within the hospital. "The institution of this new policy . . . trigger[ed] a certain amount of controversy and discussion among the medical and nursing staffs." (Pet. App. 32; see also *id.* at 6-3). Churchill was a staunch critic of the cross-training policy at the Hospital.

In August of 1986, while assisting in a "code pink" [1] Churchill was ordered by Cynthia Waters ("Waters"),

[1] A "code pink" is the term used in the obstetrics ward where there is an emergency or life threatening situation. When a "code pink" is issued, all available are required to assist the attending physician.

Churchill's supervisor, to go check on another patient. Waters arrived at the "code pink" sometime after Churchill and told Churchill "to take care of her (meaning Churchill) patients." In response to Waters' statements, Churhill replied "you don't have to tell me how to do my job." Subsequent to this event, Churchill was reprimanded through a written warning for insubordination.

In December 1986, Churchill's work performance evaluation was completed by Waters. The evaluation contained comments describing negative behavior by Churchill that "promotes an unpleasant atmosphere and hinders constructive communication and co-operation." Pet. App. 6. The evaluation indicated that Churchill's work was otherwise satisfactory. *Id.*

One month later, Churchill was overheard having a conversation with a cross-trainee. The subject of the conversation was the cross-training policy implemented by Waters and the Hospital. The conversation was overheard by Mary Lou Ballew, a nurse in the obstetrics department. Ballew reported the conversation to Waters, who reported to Davis, the Vice-President of Nursing, who reported this incident to Stephen Hopper, President of the Hospital.

Based on the reports of Davis and Waters, Hopper decided that Churchill should be fired. Davis informed Churchill that as a result of her conversation with "an employee" regarding the obstetrics department she was terminated. *Churchill v. Waters*, 977 F.2d 1114 at 1119 (1992). The specifics of the conversation are in dispute, but it was alleged that Churchill then criticized the obstetrics department for focusing on numerical coverage instead of quality of care. Davis told Churchill that she should have directed her grievances to Waters or herself. Churchill allegedly responded by telling Davis that she had voiced concerns about cross-training to Waters in the past. *Id.*

Churchill, dissatisfied with her termination filed a grievance pursuant to Hospital policy with Hopper and met

with him on February 6, 1987. Although Hopper participated in the discussions leading to the decision to fire Churchill, he met with Churchill and discussed 1) the code pink incident; 2) the negative comments on her December 1986 evaluation; and 3) Churchill's conversation with an unidentified cross-trainee in obstetrics. *Churchill*, at 1119. Hopper later sent Churchill a letter denying her grievance.

Churchill filed this action under 42 U.S.C. § 1983 in the United States District Court for the Central District of Illinois against the Hospital and the herein named petitioners. Churchill alleged that the Hospital fired her for exercising her right to free speech for criticizing the cross-training policy. Counts 1 and 3 of her complaint alleged that petitioners fired her in retaliation for her exercise of First Amendment rights. Count 2 claimed that the individual petitioners had deprived her of due process, and Count 4 alleged a state-law breach of contract claim against the Hospital. Churchill amended her complaint shortly thereafter asserting that her First Amendment right of free speech had been violated. The First Amendment and other ancillary issues are presently before this Court.

The District Court granted summary judgment in favor of the petitioners stating that the conversation was not protected speech. The 7th Circuit Court of Appeals reversed stating that Churchill's speech is a matter of public concern when viewed in the light most favorable to Churchill. The Circuit Court stated "Churchill's version of her statements, are that she was speaking out on improper nurse staffing policies * * * that endangered the quality of patient care, an issue that is most certainly a matter of public concern."

SUMMARY OF THE ARGUMENT

Central to any review of this case is a review of the actions at question. When a nurse expresses concern about practices and policies that may undermine the care of the patient and are inconsistent with the ethical and professional standards of nursing practice, that speech is protected through one's First Amendment rights or through public policy exceptions as defined by the state. *Winkleman v. Beloit Memorial Hospital*, 483 N.W.2d 211 (1992); *Pierce v. Ortho Pharmaceutical Corporation*, 84 N.J. 58, 417 A.2d 505 (1980). If public interests guide the action of the nurse, her actions are considered justified and protected. See *Warthen v. Toms River Memorial Hospital*, 199 N.J. Super. 18, 488 A.2d 229 (App. Div.) cert. denied, 101 N.J. 255, 501 A.2d 926 (1985). When the Hospital attempts to float nurses under the guise of cross-training, serious professional and policy implications arise.[2] The policy utilized by the Hospital has been inaccurately termed cross-training and is, in fact floating, a process which can be extremely unsafe if a nurse does not have adequate experience or training to move from one work setting to another.

---

[2] Cross-training is the concept of teaching nurses skills from other disciplines and specialty areas to allow them to work outside of their area(s) of expertise. Cross-training requires a program of clinical and/or classroom study, which may vary in length based on the educational level of the trainee nurse, the intensity of the training and the clinical area of the cross-training. Floating is the temporary movement of a nurse from one duty station to another, without any training program to ensure that the nurse is knowledgeable of the responsibilities of the new duty station. Registered nurses determine the scope of their practice in light of their education, knowledge, competency and experience, and are required to refuse work if they lack appropriate competence to fulfill the tasks associated with an assignment. ANA, Code for Nurses, Art. 6.2, floating is not a preferred approach to nursing care.

Churchill's discussions of the policy were not directed at individuals, but instead concerns about the process. Her speech, by all accounts was not directed at individuals, but instead at Hospital policy which was inconsistent with professional nursing's standards and code of ethics. See *Code for Nurses with Interpretive Statements* (ANA: 1985); *Nursing: A Social Policy Statement* (ANA: 1980); and *Standards of Clinical Nursing Practice* (ANA: 1991). Thus, this speech is not only protected, but it was conducted in a manner consistent with professional standards and Hospital policy.

Further, a public employer may not neglect its responsibility when it chooses to terminate an employee for engaging in speech which is later discovered to be protected speech. *Pickering v. Board of Education*, 391 U.S. 563 (1968). While a hospital should be given latitude in maintaing a proper environment for the treatment of its patients, courts have recognized that a hospital should not be permitted to mask its arbitrary suppression of protected speech behind claims that the speech creates an antitherapeutic situation. *Jones v. Memorial Hospital System*, 627 S.W. 2d 221 (Tex. App. 1984). In the motion for summary judgment, the District Court supported the concept that "when a public employer fires an employee for engaging in speech, and that speech is later found to be protected under the First Amendment, the employer is liable for violating the employee's free speech rights regardless of what the employer knew at the time of termination. See *Churchill v. Waters*, 977 F.2d 1114 at 1126 (1988) and *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977). The petitioners have admitted that Churchill was discharged for engaging in what was later found to be "protected speech." *Churchill*, at 1119. However, petitioners also contend that they did not have a duty to determine or investigate whether the communications of Churchill were "protected speech." Yet the petitioners contend Churchill was fired for engaging in communication which

was found to be protected speech within the meaning of the U.S. Constitution.

Churchill, prior to her termination, was a good employee with seven years of service. From the record she has no blemishes on her employment record other than the two infractions which the petitioners deemed warnings. Churchill, like any other citizen, is entitled to constitutional protection when the subject matter of her communications are a matter of public concern. The speech which provoked this lawsuit concerned the "cross-training policy of the Hospital. Churchill's major concern was the deficiency in the cross-training policy. The hierarchy within the Hospital was aware of Churchill's objections to this policy and neglected to rectify or address this issue. Churchill was terminated for voicing her objections which were protected by the First Amendment of the United States Constitution. Therefore, the Hospital is liable for the unlawful termination of Churchill.

The Court of Appeals in its decision held that the institutional petitioners were not entitled to qualified immunity. *Churchill*, at 1127. The authority for this holding rests with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the court stated:

> Government officials performing discretionary functions are shielded from liability for civil damages unless their conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known'. (citation omitted) The principle behind the doctrine is that 'if the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.'

The petitioners seek to insulate themselves under the doctrine of qualified immunity based upon their ignorance.

The law in Illinois is clear [3]—Illinois indemnifies public employees from judgments against them for actions within the scope of their employment. Subsequently, the individual petitioners are not entitled to qualified immunity under Illinois law.

ARGUMENT

I. A "CROSS-TRAINING" PROGRAM IMPLEMENTED BY A HOSPITAL MUST ENSURE COMPETENT AND EFFECTIVE TRAINING TO GUARANTEE THE HEALTH AND SAFETY OF ITS PATIENTS AND STAFF

Hospitals must provide adequate and timely orientation and cross-training if a nursing member is assigned to more than one type of nursing unit. The Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"), *Accreditation Manual* (NC) Nursing Care §§ 2.3, 3.1 (1992).[4] JCAHO through its accreditation manual has established the minimum criteria necessary for hospitals to implement a "cross-training" program. *Id.*

Cross-training aims to broaden the competencies of nursing personnel while rectifying the staff shortage problem in hospitals. Lyons, *Cross-Training: A Richer Staff for Leaner Budgets,* Nurs. Mang. (Jan. 1992). While nursing organizations vary on the length of time necessary to properly cross-train individuals, all agree the RN should be given adequate time to understand the scope of new practice, to develop skills and expertise of the new job and proficiency in the task. One nursing program believes that to maintain an effective cross-training program, a nurse should be assigned to a department for four to six weeks. *Id.* Vanderbilt University Hospital is an insti-

[3] See, Ill. Rev. Stat. ch. 85 P 9-102 (1992).

[4] The Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") is a private, non-profit organization which has provided accreditation for about five thousand three hundred (5,300) hospitals and three thousand (3,000) other health care organizations.

tution which has implemented a viable cross-training program. The criteria for the Vanderbilt program are:

> Employees are divided into teams of two. Each team includes at least one registered nurse and either a medical technologist, radiologic technologist, respiratory therapist or licensed practical nurse.
>
> Any member of the team can handle the simplest tasks in each specialty such as teaching patients how to breathe deeply or drawing blood from patients. The most complicated tasks are performed by specialists in each area. Registered nurses are the only members with the authority to assess patients' overall progress.
>
> The hospital developed practice parameters and care plans that teams modify when necessary to accommodate patients' needs. Teams care for a specific set of patients throughout patients' stays on the unit. Modern Healthcare, *Staff cross-training caught in cross fire,* p. 26 (May 1991).

Although the Vanderbilt plan cross-trains unlicensed assistive personnel and utilizes registered nurses in the capacity as a team leader, the overall structure of the program is similar to models used throughout the country.[5]

McDonough terms its actions "cross-training," when nurses are actually "floating" to different units within the hospital when that particular area was understaffed. Contrary to JCAHO standards and those enumerated by scholars within the nursing profession, McDonough's program does not establish continuity in the training agenda. The protocol under McDonough's policy called for nurses to float, or as McDonough coins the phrase "cross-train," only on an as-needed basis. *Churchill,* at 1116. Further, McDonough's "cross-training" program requires the nurse

[5] For more examples of cross-training structure and design, *see,* Hast, A.S. & Serish, *A. "Cross training programs in critical care",* Critical Care Nurse, 6(6): 74-81 (Nov.-Dec. 1986).

to work in a new department on an "as needed" basis, with no stated duration or formal training. McDonough's policy is void of all JCAHO principals which are embodied in the accreditation manual.

The necessity of continually training under the cross-training method is to ensure competency and quality of the services provided to the patient. JCAHO *infra.*; Lyons, *infra.* Competent cross-training policies have come under much criticism. Strohbach, *Clinical Excellence and Cross-Training,* Am. J. Maternal Child Nurs. 17:65 (March/Apr. 1992). Although cross-training programs are designed to achieve competency in more than one clinical area, the time that a nurse is allotted to learn the new area is usually insufficient. *Id.*

A nurse who is properly cross-trained in a given field of practice is deemed to be competent in the field. A nurse may be subjected to tort liability if a patient is injured. *Strohbach, infra.* The American Nurses Association, *Code For Nurses With Interpretive Statements,* 5.1 (1985), states that: * * * [i]t is the personal responsibility and must be the personal commitment of each individual nurse to maintain competence in practice throughout a professional career * * *. *Id.*

II. "FLOATING" IS AN INAPPROPRIATE HOSPITAL POLICY FOR THE PURPOSES OF ALLEVIATING STAFF SHORTAGES

The practice of "floating" has been implemented by many hospitals to resolve short-staffing situations. *O'Rielly, Floating: A Reality And A Problem?,* Focus on Critical Care 14:3, p. 60 (1987). Although, JCAHO has codified the practice of nurse reassignment (NC) 2.3, 3.1 within the subheading of floating; in a practical sense the JCAHO standards connote "cross-training." Floating, in its practical application, involves the transferring of a nurse from one unit when other units in the hospital

are understaffed. Many nurses today are uncomfortable with "floating." *O'Rielly, id.* In fact, nurses have been terminated for refusing to float. *Francis v. Memorial General Hospital,* 726 P.2d 852 (N.M. 1986). In *Winkleman v. Beloit Memorial Hospital,* 483 N.W.2d 211 (Wi. 1992), a nurse was terminated for refusing to float from the nursery area to an area in the hospital involving post-operative and geriatric care patients. The basis for her refusal was that she lacked the training necessary to service the patients in that area. Winkleman was terminated for insubordination because of her refusal ot "float." Winkleman sued for wrongful termination and was reinstated. A nurse, when accepting a task is imputing that he/she is competent to perform such tasks.

Nurses have been held to standards of care which reflect certain skills and expertise to provide specialized care. In one case, a nurse was held liable when she delegated the task of monitoring a patient to another nurse. When comparing the RN to the specialty physician provider—an anethesiologist—the court held:

> . . . that it was the job of the recovery room nurse to monitor the patient and that the doctor had not deviated from the medical standard in leaving the recovery room. . . . *Eyoma v. Falco,* 247 N.J. Super 435 at 440 (1991).

Moreover, the court has consistently held the nurse to a professional standard of care based on her education, skills and expertise within a particular setting. See *Lunsford v. Board of Nurse Examiners for the State,* 648 S.W.2d 391 (Tex. App. 3d District); *Murphy v. Rowland,* 609 S.W.2d 292 (Texas Civ. App. 1980).

Ethical and moral obligations prohibit a nurse from performing functions where the nurse has not had adequate training. *See,* ANA, Standards of Clinical Nursing Practice (1991). The ethical canons incorporated into nurse practice acts and the Code for Nurses published

by ANA prohibits nurses from accepting tasks which they are incapable of performing. The *Standards of Clinical Nursing Practice* are published by ANA, and provided, in part, in the Appendix of this brief.

These canons and standards direct a nurse in her/his daily work regimen and are based on an educational approach used by *all* schools of nursing. Although these standards are published by ANA, all state nurse associations ratified them [6] and over 38 organizations have endorsed the 1991 revisions.[7]

A nurse can be placed in a precarious situation when accepting a floating assignment. First, there is the potential liability of the nurse working on a unit that is understaffed. The nurse may not be experienced in the patient care and technological skills unique to that unit. Moreover, the quality of patient care is compromised. An inexperienced nurse may not monitor or provide necessary care to the patient. In practical terms, "floating" does not serve the needs of the public nor the hospital. Competence and quality of care are circumscribed when floating is practiced.[8]

Churchill's criticism of the cross-training policy was recognized by the Circuit Court as "protected speech" within the meaning of the First Amendment of the U.S. Constitution. *Churchill,* at 1127. Specifically, Churchill contends that the program as implemented did not give the nurse adequate time to learn the skilled area to consider oneself "trained" or "cross-trained" in that particular area. Also these matters have a direct effect on the quality of patient care and accreditation of the hospital. The Hospital's program, like the programs mentioned in Strohbach's article do little to develop expertise and competence among the nursing staff. Inadequate time and training to develop necessary skills in a new field of practice are detrimental to the patient and expose the nurse to tort liability as well.

[6] Churchill is a member of the Illinois Nurses Association which is an affiliate member of the American Nurses Association.

[7] As indicated in the appendix, ANA has revised or developed 31 general or specialty nursing standards documents.

[8] For more information on floating, *see, "Cross-Utilization of Nursing Staff,* Nurs. Mang. 21:7, pp. 38-39; and Cushing, Maureen, *Short Staffing on Trial,* 88 Am. J. Nurs. 2, pp. 161-162 (1988).

III. McDONOUGH'S "CROSS-TRAINING" PROGRAM IS DEFECTIVE AND VOID OF THE NATIONAL STANDARD AND ENDANGERS THE QUALITY OF CARE GIVEN TO ITS PATIENTS

Nurses who are assigned to more than one unit *must* be adequately trained to perform that particular function. JCAHO (NC) 2.3 requires nurses who are assigned to more than one type of nursing unit to be adequately trained and competent to perform such tasks. The Circuit Court ruled correctly when it determined that the Hospital's "cross-training" programs did not conform to JCAHO standards. *Churchill v. Waters,* 977 F.2d 1114 at 7th Cir. 1122 (1992). Although, the accreditation manual codifies NC 2.3. under the subheading of floating—it does not denote floating in its practical application. The Hospital's "cross-training" program is effectively a floating program. The objectives of floating have been addressed earlier in this brief. The objective of "cross-training" in its practical application is designed to ensure that the nurse is adequately trained and the patients receive quality health care.

As the Circuit Court noted "Churchill objected to the cross-training program not as a matter of policy but on the grounds that the cross-training was being implemented improperly, for rather than being assigned to a department for an organized training program on a regular schedule, nurses were assigned to other departments for cross-training only when their respective departments were over staffed vis-a-vis the nurse-patient ratio in the

particular discipline." *Churchill v. Waters,* 977 F.2d at 1116 (1992).

The implications of inadequately trained nurses are a matter of public concern. Speech communicated by government employees which address matters of public concenr is protected speech within the meaning of the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563 (1965). Moreover, the *Code for Nurses* prohibits nurses from engaging in tasks where they have not been adequately trained.

When a nurse receives additional training according to JCAHO standards and ANA guidelines, that nurse is competent to perform the additional duties of that new unit. Cross-training embodies the essential requisites of competence. To allow the Hospital to implement this program and punish Churchill for notifying the Hospital of its deficiencies and sharing her concerns with co-workers may have a chilling effect on the First Amendment.

IV. CHURCHILL'S CONVERSATION REGARDING THE HOSPITAL'S CROSS-TRAINING PROGRAM IS PROTECTED SPEECH UNDER THE FIRST AMENDMENT BECAUSE IT ADDRESSES A MATTER OF PUBLIC CONCERN

It is well settled that a state may not condition employment "on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers,* 461 U.S. 138, 142 (1983); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In analyzing whether a public employer's actions impermissibly infringe on free speech rights, the Supreme Court has adopted a multi-tier test. *Schalk v. Gallemore*, 906 F.2d 491, 494 (10th Cir. 1990); *Frazier v. King et al.*, 873 F.2d 820, 825 (5th Cir. 1989).

In the first tier of the test, the court must decide whether the speech at issue may be "fairly characterized as constituting speech on a matter of public concern."

Connick, 461 U.S. at 146; *Cf. Rankin et al. v. McPherson*, 483 U.S. 378, 384 (1987). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-148; *Rankin*, 483 U.S. at 384-385. "It is clear that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values and is entitled to special protection' " *Smith v. Cleburne County Hospital, et al.*, 870 F.2d 1375, 1381 (quoting *Connick*, 461 U.S. at 146). However, where the speech touches on a matter of public concern and it is in conflict with "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," these interests must be balanced. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Cf. Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 285 (1977).

In balancing conflicting interests, the court will consider the manner, time, and place of the employee's speech, as well as the context in which the conflict arose. *Rankin*, 483 U.S. at 388; *Schalk*, 906 F.2d at 496. As part of its analysis, the Court has recognized as pertinent "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388; *Pickering*, 391 U.S. at 570-573.

If the speech is protected, the employee must then show that the speech was a substantial or motivating factor in the employer's adverse action. *Mt. Healthy*, 429 U.S. at 287. Finally, if the employee sustains this burden, the burden is shifted to the employer to show by a preponderance of the evidence that it would have made the same decision regardless of the protected speech. *Id.*

The Circuit Court has determined that the speech communicated by Churchill was protected speech as it relates to matters of public concern. *Churchill, a*t 1127. Churchill was very concerned about the efficiency of the cross-training program implemented at McDonough. Ineffective or inadequate training programs have a direct effect on the quality of patient care. The Circuit Court has stated that these issues are surely a matter of public concern. *Id.*

In *Mt. Healthy*, Doyle, the respondent, made communications which were a matter of public concern and was discharged. However, Doyle's employment record established many grounds to negate the reissuance of his contract. The court in *Mt. Healthy* imposed a burden on the employee to show that the protected speech, in light of all other reasons for discharge, was a substantial or motivating factor for dismissal. In the instant case, Churchill had given her superiors notice of her concerns about the cross-training policy prior to receiving a warning for insubordination and an average work performance evaluation. When additional comments were made to a peer, Churchill was terminated. In fact, the Hospital has admitted that the speech was the motivating factor for Churchill's dismissal. *Churchill,* at 1119. Thus, if a Mt. Healthy analysis is completed, the court will find not one, but two bases for finding Churchill's speech protected.

A. Churchill's Conversation Regarding the Quality and Level of Nursing Care Provided by the Hospital Is a Matter of Public Concern

The evidence clearly demonstrates that Churchill's conversation focused on the quality and level of nursing care at the Hospital and was, therefore, a matter of public concern. As the Circuit Court found, "[t]here can be no doubt that when questioning the hospital's violation of state nursing regulations as well as the quality and level of nursing care it provides its patients, the nurse is speaking about matters of public concern." *Churchill,* at 1121. Thus, Churchill's conversation with other nurses almost entirely related to cross-training and inadequate staffing. During this conversation, Churchill expressed concern that the Hospital's cross-training program was not being implemented properly. Moreover, as the Circuit Court below noted, Churchill's discussion regarding the Hospital's cross-training program raised concerns as to whether the Hospital's implementation of the cross-training program actually complied with the accreditation standards promulgated by the Joint Commission on Accreditation of Healthcare Organizations. Thus, Churchill asserted the Hospital's cross-training policy "appears to have been implemented merely to meet the bottom-dollar concerns of the Hospital administration rather than the 'nursing care of patients.'" Clearly, this conversation touched on a matter of public concern as it can "be fairly considered as related to any matter of political, social, or other concern of the community." *Schalk,* 906 F.2d at 494, *quoting Connick,* 461 U.S. at 146. See, *Frazier v. King,* 873 F.2d 820, 825 (5th Cir. 1989) ("[T]he quality of nursing care given to any group of people . . . is a matter of public concern.")

Further, Churchill's statements were not made in the context of an ongoing personal employment grievance. See *Schalk,* 906 F.2d at 495. Churchill received good evaluations and believed that any deterioration in her relationship with her supervisor was due to Churchill's opposition to the Hospital's improper implementation of the cross-training program. As the Circuit Court found, Churchill's "actions fall far short of the actions of an insubordinate or problem employee." *Churchill,* at 1125. Moreover, Churchill indicated that she did not have a problem with her supervisor and did not make any derogatory comments about her during her conversation on the cross-training policy.

B. On Balance, Churchill's First Amendment Interest in Expressing Her Opinion About the Hospital's Cross-Training Policy Outweighs the Hospital Interest

It is clear that Churchill's interest in expressing her opinion about the Hospital's cross-training policy outweighed the Hospital's interests. As Churchill maintains, the purpose of her conversation was to bring the possible violation of state regulations to light and to discuss the risks to patients because of the inadequacy of the Hospital's cross-training policy. *Churchill*, at 1126. Further, as the Seventh Circuit notes, Churchill engaged in the conversation regarding the Hospital's cross-training policy in furtherance of her interest "in fulfilling her ethical duty as a nurse to speak out on what she believes to be a matter of public concern that is related to the safety and proper care of the patients entrusted to her care." *Id.* *Code for Nurses*, Canon 6.

The importance of Churchill's ethical responsibility becomes more apparent when viewed against the Hospital's interest. The Hospital claims that Churchill's conversation interfered with its "need to maintain discipline or harmony among co-workers" and "the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence." *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972). However, as the Seventh Circuit determined, this interest could not possibly outweigh Churchill's interest in "speaking out on important matters of public concern." *Churchill*, at 1128. And, this interest does not outweigh the standards of Churchill's profession. As we have indicated above, Churchill's actions were not the actions of an insubordinate or disruptive employee. *Churchill*, at 1125. Rather, Churchill had "identified and was trying to do something about the problems that had

the potential of having detrimental effects on her patients —charging untrained nurses with patient care in obstetrics, understaffing the hospital and interfering with the duties of competent nurses in obstetrics as the result of assigning cross-trainees with a lack of education and skill to them." *Id.* Thus, Churchill's interest in fulfilling her duties and obligations as an ethical, responsible professional . . . clearly outweigh the hospital's interest in interfering and ultimately preventing her from speaking out . . ." *Id.*

V. HOSPITAL ADMINISTRATORS ARE NOT ENTITLED TO IMMUNITY WHEN THEY HAVE VIOLATED THE RIGHT TO FREE SPEECH OF ONE OF THEIR EMPLOYEES

Illinois law indemnifies public employees when they have been found to have violated a person's constitutionally protected rights while acting within the scope of their employment. Ill. Rev. Stat. ch. 85 P 9-102 (1993). The very existence of the statute is a tacit acknowledgement that individuals while acting in their administrative capacity are liable for violations of the rights of others. *Id.* Many courts have held government employers personally liable when they were found to have infringed the constitutional rights of others. *Commonwealth of Pennsylvania v. Philadelphia Psychiatric Center*, 356 F. Supp. 500 (1973); 107 A.L.R. Fed. 21 § 42(a) (1992). In *Philadelphia Psychiatric Center*, the hospital and its administrators were held liable for discharging an employee when the court ruled that they had violated her constitutionally protected right of free speech. The employee was reinstated and received a monetary award.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the American Nurses Association supporting the respondents requests that this Honorable Court affirm the Circuit Court opinion.

Respectfully submitted,

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APPENDIX

APPENDIX

STANDARD I. QUALITY OF CARE

THE NURSE SYSTEMATICALLY EVALUATES THE QUALITY AND EFFECTIVENESS OF NURSING PRACTICE.

Measurement Criteria

1. The nurse participates in quality of care activities as appropriate to the individual's position, education, and practice environment. Such activities may include:

   *Identification of aspects of care important for quality monitoring.

   *Identification of indicators used to monitor quality and effectiveness of nursing care.

   *Collection of data to monitor quality and effectiveness of nursing care.

   *Analysis of quality data to identify opportunities for improving care.

   *Formulation of recommendations to improve nursing practice or client outcomes.

   *Implementation of activities to enhance the quality of nursing practice.

   *Participation on interdisciplinary teams that evaluate clinical practice or health services.

   *Development of policies and procedures to improve quality of care.

2. The nurse uses the results of quality of care activities to initiate changes in practice.

3. The nurse uses the result of quality of care activities to initiate changes throughout the health care delivery system, as appropriate.

STANDARD II. PERFORMANCE APPRAISAL

THE NURSE EVALUATES HIS/HER OWN NURSING PRACTICE IN RELATION TO PROFESSIONAL PRACTICE STANDARDS AND RELEVANT STATUTES AND REGULATIONS.

Measurement Criteria

1. The nurse engages in performance appraisal on a regular basis, identifying areas of strength as well as areas for professional/practice development.***

***STANDARD V. ETHICS

THE NURSE'S DECISIONS AND ACTIONS ON BEHALF OF CLIENTS ARE DETERMINED IN AN ETHICAL MANNER.

Measurement Criteria

3. The nurse acts as a client advocate.

***STANDARD VI. COLLABORATION

THE NURSE COLLABORATES WITH THE CLIENT, SIGNIFICANT OTHERS, AND HEALTH CARE PROVIDERS IN PROVIDING CLIENT CARE.

Measurement Criteria

1. The nurse communicates with the client, significant others, and health care providers regarding client care and nursing's role in the provision of care.
2. The nurse consults with health care providers for client care, as needed.
3. The nurse makes referrals, including provisions for continuity of care as needed.***

***STANDARD VIII. RESOURCE UTILIZATION

THE NURSE CONSIDERS FACTORS RELATED TO SAFETY, EFFECTIVENESS, AND COST IN PLANNING AND DELIVERING CLIENT CARE.

Measurement Criteria

1. The nurse evaluates factors related to safety, effectiveness, and cost when two or more practice options would result in the same expected client outcome.
2. The nurse assigns tasks or delegates care based on the needs of the client and the knowledge and skill of the provider selected.
3. The nurse assists the client and significant others in identifying and securing appropriate services available to address health-related needs.

STANDARDS PUBLISHED BY AMERICAN NURSES ASSOCIATION

Standards of Nursing Practice	1973
Standards of Medical Surgical Nursing Practice	1974
Standards of Orthopedic Nursing Practice	1975
Standards of Neurological and Neurosurgical Nursing Practice	1977
Standards of Urological Nursing Practice	1977
Standards of Pediatric Oncology Nursing Practice	1978
Outcome Standards for Cancer Nursing Practice	1979
A Statement of the Scope of Medical-Surgical Nursing Practice	1980
Standards of Cardiovascular Nursing Practice	1981
Standards of Perioperative Nursing Practice	1981
Standards of Psychiatric-Mental Health Nursing Practice	1982
Standards for Organized Nursing Services	1982
Outcome Standards for Rheumatology Nursing Practice	1983
Standards for Maternal-Child Health Nursing Practice	1983
Standards for Professional Nursing Education	1984
Standards for Continuing Education in Nursing	1984
Standards for the Perinatal Nurse Specialist	1985
Standards of Child and Adolescent Psychiatric and Mental Health Nursing Practice	1985
Standards of Nursing Practice in Correctional Facilities	1985
Standards of Rehabilitation Nursing	1986

Orthopedic Nursing Process: Process and Outcome Criteria for Selected Diagnoses	1986
Standards of College Nursing Practice	1986
Standards of Community Health Nursing Practice	1986
Standards of Home Health Nursing Practice	1986
Standards and Scope of Gerontological Nursing Practice	1987
Scope and Standards of Hospice Nursing Practice	1987
Standards of Oncology Nursing Practice	1987
Standards of Practice for the Primary Health Care Nurse Practitioner	1987
Standards of Additions Nursing Practice with Selected Diagnoses and Criteria	1988
Standards for Organized Nursing Services (revised)	1988
Standards for Nursing Staff Development	1990
Standards of Clinical Nursing Practice	1991

The following state nurses' associations have agreed to sign onto the amicus brief of the American Nurses Association, supporting the respondent Cheryl Churchill.

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No. 92-1450

In The Supreme Court of the United States

October Term, 1993

Cynthia Waters, Kathleen Davis, Stephen Hopper, and McDonough District Hospital, an Illinois Municipal Corporation,
Petitioners,

v.

Cheryl R. Churchill and Thomas Koch, M.D.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO AS AMICUS CURIAE SUPPORTING RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1450

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,

Petitioners,

v.

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO AS AMICUS CURIAE SUPPORTING RESPONDENTS

This brief *amicus curiae* is submitted by the National Education Association ("NEA") and the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") with the written consent of the parties, as provided in the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

NEA is a nationwide labor organization with a current membership of more than 2 million persons, the vast majority of whom are employed by public school districts, colleges and universities. AFSCME is a nationwide labor

organization with a current membership of approximately 1.3 million public employees. The principal issue presented to this Court is whether the discharge of a public employee for engaging in protected speech violates the First Amendment *if and only if* the public employer has the "motive" or "intent" to deprive the employee of her First Amendment rights. The members of the NEA and AFSCME, as public employees, have a direct interest in the disposition of this issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is undisputed that the plaintiff-respondent in this case, Cheryl R. Churchill, was discharged from her employment as a nurse for the McDonough District Hospital ("Hospital") *because of her speech.* As the court below stated, "[t]he defendants admit that they fired Churchill because of her conversation with Perkins-Graham on January 16, 1987." Pet. App. at 10. *See also id.* at 6 ("The incident that directly led to Churchill's dismissal was her January 16, 1987 break-room conversation with a cross-trainee, Melanie Perkins-Graham, and Dr. Koch.").

The facts regarding the precise content of Churchill's speech are, however, sharply disputed. Churchill contends that her conversation with Perkins-Graham centered on the Hospital's policy of "cross-training" nurses—an issue of public concern—and that the conversation was not disruptive or insubordinate. The petitioners, in turn, contend—based on co-worker reports of the conversation and a limited investigation into those reports—that the conversation did not center on the issue of cross-training (which petitioners concede is a matter of public concern) and that it was in any event disruptive and insubordinate. Because of this factual dispute, the court below held that summary judgment was inappropriate on the threshold issue of whether the speech involved a matter of "public concern" under *Connick v. Myers*, 461 U.S. 138, 142 (1983), and if so whether the speech constituted *protected activity* under the so-called "*Pickering* balancing

test," *see Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and was therefore an impermissible basis for Churchill's discharge. The *Pickering* balancing test, of course, requires the court in each case "to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568; *see also Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

Petitioners, supported by the United States, seek to pretermit the application of *Connick* and the *Pickering* balancing test to the facts of this case by arguing that *even if* Churchill's speech was constitutionally protected under those decisions, she nevertheless could be discharged for engaging in that speech if petitioners were unaware at the time of the discharge of the precise aspects of the speech that rendered it protected. This result follows, the petitioners maintain, because a First Amendment unlawful discharge claim under *Connick* and *Pickering* depends on a showing that the employer had a state-of-mind—a "motive" or "intent"—to punish the employee for engaging in protected speech. *See* Brief for the Petitioners ("Pet. Br.") at 24-28; *see also* Brief for the United States As Amicus Curiae Supporting Petitioners ("United States Br.") at 12-17. According to petitioners, the court below thus erred in holding "that a constitutional violation can be found here if the *effect* of defendants' action was to terminate Churchill because of her protected speech, even if that was not their intent." Pet. Br. at 25 (emphasis in original).

We demonstrate in Part I below that a First Amendment unlawful discharge claim under *Connick* and *Pickering* does not depend on any showing that the employer had a "motive" or "intent" to punish the employee for engaging in protected speech. A First Amendment violation is established under those decisions whenever the

purpose *or effect* of the discharge is to punish the employee for engaging in protected speech. To hold otherwise would be contrary to an unbroken line of this Court's decisions rejecting the proposition that a governmental "motive" or "intent" to punish or suppress the exercise of First Amendment rights is a necessary element of a First Amendment claim. Therefore, a public employer who discharges an employee because of speech that is in fact protected by the First Amendment is not relieved of liability merely because the employer was not fully cognizant of the protected nature of the speech.

We then demonstrate in Part II below that although an employer's knowledge of the precise details of an employee's protected speech is not a necessary element of a First Amendment unlawful discharge claim, the lack of such knowledge on the part of the individual officials involved in the decision to discharge the employee is a relevant consideration in determining whether those officials are immune from personal liability in damages.

ARGUMENT

I.

There can be no question that public employers violate the First Amendment when they dismiss public employees with the "motive" or "intent" of silencing the employees from speaking on matters of public concern. "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin, supra*, 483 U.S. at 384. Thus, a "motive" or "intent" to silence public employees from speaking on matters of public concern is *sufficient* to establish a First Amendment violation. The question presented here, however, is whether such a motive or intent is a *necessary* element of a First Amendment unlawful discharge claim under *Connick* and *Pickering*.

A. Although the Court has never addressed this precise question in the present context, it has on numerous occasions rejected the proposition that a governmental "motive" or "intent" to punish or suppress the exercise of First Amendment rights is a necessary element of a First Amendment claim.

A good illustration is this Court's decision in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). In that case, an Alabama state court held the NAACP in contempt for refusing to obey an order compelling the NAACP to produce the names and addresses of members doing business in the State. The NAACP argued on behalf of its members that the production order unduly restricted the members' exercise of their free association rights in violation of the First Amendment. Alabama countered that there was no First Amendment violation because the *intended purposes* of the production order were legitimate and wholly unrelated to the suppression of First Amendment rights. The Court rejected Alabama's argument, finding that First Amendment rights are entitled to protection against *both* intended *and* unintended intrusions:

> The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direct action, cf. *De Jonge v. Oregon, supra; Near v. Minnesota*, 283 U.S. 697, to restrict the right of petitioner's members to associate freely, does not end inquiry into the *effect* of the production order. See *American Communication Assn. v. Douds*, 339 U.S. 382, 402. In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action. Thus in *Douds*, the Court stressed that the legislation there challenged, which on its face sought to regulate labor unions and to secure stability in interstate commerce, would have

the practical effect "of discouraging" the exercise of constitutionally protected political rights, 339 U.S., at 393, and it upheld the statute only after concluding that the reasons advanced for its enactment were constitutionally sufficient to justify its possible deterrent effect upon such freedoms. Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. *United States v. Rumely*, 345 U.S. 41, 46-47; *United States v. Harriss*, 347 U.S. 612, 625-626. The governmental action challenged may appear to be totally unrelated to protected liberties. [357 U.S. at 461 (emphasis added).]

Thereafter, in *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), the Court succinctly restated this basic principle of First Amendment law:

> [R]egulatory measures . . . no matter how sophisticated, cannot be employed in purpose *or in effect* to stifle, penalize, or curb the exercise of First Amendment rights. [*Id.* at 297 (emphasis added).]

Just two Terms ago, in *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501 (1991), the Court again reaffirmed this basic principle:

> The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." Simon & Schuster need adduce "no evidence of an improper censorial motive." As we concluded in *Minneapolis Star*, "[w]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise

> of rights protected by the First Amendment." [*Id.* at 509 (citations omitted).]

Accord, e.g., NAACP v. Button, 371 U.S. 415, 439 (1963); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).[1]

B. The foregoing principle of law derives from both the language and purposes of the First Amendment. By its terms, the First Amendment proscribes governmental action "*abridging* the freedom of speech." Const., Amend. I (emphasis added). The exercise of free speech rights may be *abridged*, of course, without regard to whether the governmental actor intended such a result. *See, e.g., NAACP v. Alabama, supra*, 357 U.S. at 461 ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that *abridgement* of such rights, even though unintended, may inevitably follow from varied forms of governmental action.") (emphasis added); *Simon & Schuster, supra*, 112 S. Ct. at 509 ("even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment").

Moreover, it is the grand purpose of the First Amendment to stimulate and nurture robust debate on issues of public concern. To this end, the Court's First Amendment cases emphasize the need for especially close judicial scrutiny of any governmental action that may dampen or "chill" such debate. *See, e.g., Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915

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[1] As *Simon & Schuster* illustrates, this principle applies even where the government does not directly prohibit speech, but places a burden on the person who engages in the unwanted speech. *Simon & Schuster* involved "a financial burden," 112 S. Ct. at 508; this case involves loss of employment, which is a burden both financially and otherwise.

& n.50 (1982). It is axiomatic that the chilling *effect* of governmental actions that burden the exercise of free speech rights does not necessarily depend on an impermissible governmental *intent* to suppress the exercise of those rights. *See NAACP v. Alabama, supra*, 357 U.S. at 461 (governmental action burdening protected First Amendment activity, though innocently motivated, may have the "practical effect 'of discouraging'" or "intimidat[ing]" that activity) (quoting *Douds, supra*, 339 U.S. at 393).

Accordingly, that the government may not have been aware of the protected nature of the speech in question, and thus did not form an intent to suppress protected speech as such, does not render lawful government action that is in effect an abridgement of protected speech. *Cf. NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964) (discussed *infra* pp. 10-12).

C. Although the First Amendment cases discussed in Part A. *supra* involved governmental regulatory or judicial action rather than governmental employment action, the basic First Amendment principle established in those cases—*viz.*, that the First Amendment proscribes governmental action the purpose *or effect* of which is to unduly restrict the exercise of First Amendment rights—is fully applicable in the public employment context. The "abridge[ment]" language of the First Amendment, of course, applies equally in both contexts. *See Givhan v. Western Line Consolidated Sch. Dist.*, 439 U.S. 410, 415 (1979). And so too does the First Amendment's purpose of stimulating and nurturing robust debate on issues of public concern. *See Pickering, supra*, 391 U.S. at 573. Indeed, the circumstances of this case demonstrate in stark terms the great damage to First Amendment interests that would result if this basic First Amendment principle were jettisoned in the public employment context.

If Churchill's version of the speech that directly led to her discharge proves to be accurate, then Churchill

> was speaking out on improper nurse staffing policies at McDonough District Hospital that endangered the quality of patient care, an issue that is most certainly a matter of public concern. [Pet. App. at 11.]

Irrespective of the "motive" or "intent" of the Hospital officials in discharging Churchill, the *direct effect* of that discharge would be to "abridge" Churchill's right to speak freely on an issue vitally affecting the health and welfare of the community. Such an abridgement, no matter how innocently motivated, strikes at the heart of the interests the First Amendment was designed to protect. As the court below observed,

> we have serious reservations about the questionable practice of transferring nurses from one discipline to another without adequate education and training, thus possibly jeopardizing the health and welfare of its patients, *and thereafter discharging an employee who properly points out the problems with the cross-training policy as implemented.* [*Id.* at 15 (emphasis added).]

Equally to the point, if the Hospital were free under the First Amendment to discharge Churchill for engaging in protected speech simply because it was mistaken about the true nature of that speech, the inevitable result would be to chill other Hospital employees from engaging in protected First Amendment activity. An employee who engages in protected First Amendment activity by speaking out, in a manner that is not disruptive or insubordinate, on an issue of public concern cannot know in advance how her speech might be reported by co-workers and whether the employer's investigation (if any) of the co-workers' reports will provide the employer with an accurate understanding of that speech. If an employee who wishes to speak out on an issue of public concern must bear the risk of losing her job in the event that her speech is inaccurately reported and ultimately misunderstood by the employer, the much safer course will be to refrain from that speech in the first instance.

To be sure, the interests of government *as employer* in maintaining order and discipline in the workplace may more readily justify the abridgement of free speech rights than the interests often asserted by government *as regulator*. *Compare Connick v. Myers, supra,* 461 U.S. at 143 *with First Nat'l Bank v. Bellotti,* 435 U.S. 765, 786 (1978). The unique interests of government employers, however, are fully accommodated by *Connick* and the *Pickering* balancing test; those employers do not need and are not entitled to the added protections of a "motive" or "intent" requirement that has absolutely no basis in First Amendment jurisprudence. If a public employer discharges an employee in the genuine belief that she has engaged in speech on a matter only of personal interest, *see Connick,* or unduly disruptive or insubordinate speech on a matter of public concern, *see Pickering, and that belief is borne out by the facts,* the employer has not violated the First Amendment. Conversely, where the employer's belief *is not borne out by the facts,* the discharge "infringes that employee's constitutionally protected interest in freedom of speech" in violation of the First Amendment. *Rankin, supra,* 483 U.S. at 383.

D. Although not a First Amendment case, similar considerations shaped this Court's decision in *NLRB v. Burnup & Sims, supra,* 379 U.S. 21, that a "motive" to "interfere with, restrain, or coerce" protected union activity is not a necessary element of an unfair labor practice charge under section (8)(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1). In *Burnup & Sims,* the employer discharged two employees who were attempting to organize the employer's workers based on *an inaccurate report from a co-worker* that the employees had threatened to dynamite the plant if their organizational efforts failed.[2] The court of appeals held

[2] At the time of the discharges the employer in *Burnup & Sims* knew that the employees were engaged in an activity—union organizing—that is "protected" under the federal labor laws (and thus an impermissible basis for discharge) so long as, *inter alia,*

that the discharge did not "interfere with, restrain, or coerce [the] employees in the exercise of the rights guaranteed in section 7 [of the NLRA]" because the employer had acted in the good faith (albeit mistaken) belief that the employees had engaged in misconduct in the course of their organizational activities, thereby forfeiting the protections of section 7. This Court reversed on the following grounds:

> Section 7 grants employees, *inter alia,* "the right to self-organization, to form, join, or assist labor organizations." *Defeat of those rights by employer action does not necessarily depend on the existence of an anti-union bias.* Over and again the Board has ruled that § 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred. . . .
>
> That rule seems to us to be in conformity with the policy behind § 8(a)(1). *Otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees.* Union activity often engenders strong emotions and gives rise to active rumors. *A protected activity acquires a precarious status if inno-*

it is not marred by acts of misconduct. Here, similarly, it is undisputed that the petitioners knew that Churchill was engaged in an activity—speech—that is "protected" under the First Amendment (and thus an impermissible basis for discharge) so long as, *inter alia,* it is not insubordinate or disruptive of the workplace. Such knowledge is no doubt a predicate to a claim that a discharge violates § 8(a)(1) or the First Amendment, because without such knowledge the essential but-for causational link between the protected activity and the discharge is absent. *See Burnup & Sims,* 379 U.S. at 23; *infra* pp. 12-14. The question in *Burnup & Sims,* as here, is whether knowledge of a more extensive and particularized kind is a necessary element of such an unlawful discharge claim. Specifically, does the employer need to know that the employee has exercised the right in question (*i.e.* the right to organize or the right to speak) in such a manner that the protected status of the right has not been forfeited. The employer lacked such

> *cent employees can be discharged while engaging in it, even though the employer acts in good faith.* It is the tendency of those discharges to weaken or destroy the § 8(a)(1) right that is controlling. [379 U.S. at 22-24 (citations omitted) (emphasis added).]

E. In support of their contention that the discharge of a public employee for engaging in protected speech violates the First Amendment only if the public employer has a state-of-mind—a "motive" or "intent"—to deprive the employee of her First Amendment rights, petitioners rely almost exclusively on this Court's decision in *Mt. Healthy City Sch. Dist. Board of Educ. v. Doyle*, 429 U.S. 274 (1977). *See* Pet. Br. at 24-28; *see also* United States Br. at 14-17. This reliance is misplaced.

Mt. Healthy involved a fact pattern—and a resulting legal issue—that simply is not presented here. The fact pattern (a common one) in *Mt. Healthy* was this: the employee asserted that the employer had refused to renew his teaching contract because of his protected speech, and the employer—while not disputing that the protected speech played some part in its decision not to renew the contract—asserted that it would have reached the same decision based on non-speech considerations (*e.g.*, the employee's inadequate performance). The resulting legal issue, as this Court described it, was simply one of but-for "causation"—*viz.*, was the protected First Amendment speech the but-for cause of the nonrenewal, or would that nonrenewal have occurred even if the protected speech had not occurred. *See* 429 U.S. at 285-86.

Based on causation principles borrowed from "other areas of constitutional law," the Court formulated the following two-prong "test of causation" to be applied in fact

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knowledge in *Burnup & Sims* because he was acting on the basis of inaccurate reports that the employees had engaged in misconduct in the course of their organizational activities. Here, similarly, it is contended that the petitioners lacked such knowledge because they were acting on the basis of inaccurate reports that Churchill's speech was on a purely private matter and was in any event insubordinate and disruptive.

situations of this type. *Id.* at 286. First, the employee must show that his constitutionally protected conduct "was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the [public employer's] decision not to rehire him." *Id.* at 287 (footnote omitted). Second, if the employee carries that burden, the employer must be given an opportunity to show "that it would have reached the same decision as to [the employee's] reemployment even in the absence of the protected conduct." *Id.*

As we have already shown, there is no issue of but-for causation in this case. Petitioners acknowledge that Churchill's speech *directly led* to her discharge from employment. *See supra* p. 2. Moreover, petitioners do not contend, as did the employer in *Mt. Healthy*, that *non*-speech considerations entered into the decision to discharge Churchill. Accordingly, *Mt. Healthy* simply is inapposite here.

In any event, both the petitioners and the United States greatly overread *Mt. Healthy* even on its own terms. The petitioners and the United States seize upon the words "motivating factor" in the first prong of *Mt. Healthy*'s two-part causation test, which requires the employee to prove that her protected conduct "was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the [employer's] decision not to rehire him." 429 U.S. at 287 (footnote omitted). In context, however, it is clear that the Court, in using the term "motivating factor," was simply referring to the requirement—essential to a finding of but-for causation in First Amendment discharge cases generally—that the employer know the speech occurred and that the speech be a factor in the employer's decision to discharge the employee. *Cf. Pickering, supra*, 391 U.S. at 574 ("a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment").

Obviously, if an employer discharges an employee without even knowing that the employee has engaged in speech,

there is no predicate for a claim that the discharge violates the First Amendment even if it subsequently comes to light that the speech occurred and that it was protected. In these circumstances, there would simply be no *but-for causational link* between the protected speech and the discharge. But this is a far cry from saying that where, as here, an employer consciously decides to discharge an employee *because of* speech that is in fact protected—and there is thus no issue of "motivation" in the strict causational sense—the employer can escape liability by showing that it had no state-of-mind—no "motive" or "intent"—to punish the employee for engaging in that protected speech. It is untenable to suggest that the *Mt. Healthy* Court meant to adopt such an unprecedented state-of-mind requirement in so casual a manner and with nary a mention of the Court's unbroken line of First Amendment decisions rejecting the existence of such a state-of-mind requirement. *See supra* pp. 5-8.[3]

[3] Petitioners also misconstrue *Mt. Healthy's* citation to footnote 21 of the Court's opinion (issued the same day) in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270 (1977). *See Mt. Healthy*, 429 U.S. at 287. According to petitioners, the citation to footnote 21 in the *Arlington Heights* opinion evidences the *Mt. Healthy* Court's intention to incorporate into First Amendment law the same state-of-mind requirement that the *Arlington Heights* Court found to exist in cases of alleged racial discrimination under the Equal Protection Clause. *See* Pet. Br. at 25-26 & n.24. The problem with petitioners' argument, however, is that footnote 21 contains no substantive discussion of the Equal Protection Clause's state-of-mind requirement; that requirement is discussed (and reaffirmed) in an earlier portion of the Court's opinion. *See* 429 U.S. at 264-66. Footnote 21 merely makes the point—with a cross-reference to *Mt. Healthy* itself—that a two-part causation test applies under the Equal Protection Clause when governmental actions are based in part on a discriminatory purpose and in part on a non-discriminatory purpose. By citing this footnote, the *Mt. Healthy* Court was (it appears) simply buttressing its point that this two-part *causation* test applies "[i]n other areas of constitutional law." 429 U.S. at 286. Had the *Mt. Healthy* Court intended instead to incorporate the Equal Protection Clause's state-of-mind requirement into First Amendment law, it more likely would have done so after a more extended discussion and with specific reference to that portion of the *Arlington Heights* opinion addressing that state-of-mind requirement.

F. The petitioners' reliance on *Daniels v. Williams*, 474 U.S. 327 (1986), *see* Pet. Br. at 26, is equally misplaced. In *Daniels*, this Court held that only intentional deprivations of life, liberty and property are cognizable under the Due Process Clause of the Fourteenth Amendment. At the same time, however, the Court noted that the existence of such a state-of-mind requirement depends on the particular constitutional right in question. *See* 474 U.S. at 330 ("in any given § 1983 suit, the plaintiff must . . . prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim"). As we have already shown, it is well-established by the decisions of this Court that *First Amendment rights* are entitled to protection against both intended and unintended abridgements. *See supra* pp. 5-8.

G. Finally, there is no merit to the assertion of petitioners and the United States that the court below erred in imposing on public employers an unprecedented "duty to investigate" the details of a public employee's speech. Pet. Br. at 36-38; United States Br. at 17-22.

The court below imposed no such "duty to investigate." Indeed, the court *rejected* Churchill's argument that the First Amendment contains a "due process" component that requires an employer to follow certain minimum procedures before discharging an employee on the basis of her speech. *See* Pet. App. at 22-23.

The court below simply held that an employer who discharges an employee on the basis of speech that is in fact protected violates the First Amendment without regard to the depth of the employer's knowledge of and investigation into the precise content of that speech. *Id.* at 25. As we have already shown, that holding is faithful to a basic First Amendment principle repeatedly reaf-

firmed by the decisions of this Court. *See supra* pp. 5-8. If that holding were to have the *practical effect* of encouraging public employers to undertake more careful investigations before discharging employees on the basis of their speech, that would be a positive good and not a reason for reversal. *See supra* pp. 8-12.

II.

Although a public employer violates the First Amendment when it discharges an employee on the basis of speech that is in fact protected, even if the employer does not know the precise content of that speech, the second issue presented here is whether such lack of knowledge may provide the basis for a qualified immunity defense on the part of *the individual officials* involved in the decision to discharge the employee. *See* Petition for Certiorari at i. If such a qualified immunity defense applies, then the individual officials would not be personally liable in damages for the First Amendment violation. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987).[4]

On this quite separate issue, we believe that the court below may have overstated matters to some extent in declaring that "ignorance of the nature of the employee's speech

[4] Whether or not individual officials could establish a qualified immunity defense, *the government entity itself* would be liable for prospective injunctive relief (reinstatement) and for damages if a government official with final policymaking authority made, approved or ratified the decision to discharge the employee because of her speech. *Cf. City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion). Moreover, in our view the government entity could be required to *reinstate* the employee even if the decision to discharge her was not made, approved or ratified by an official with final policymaking authority, although the government entity would not be *monetarily* liable in such circumstances. *See Chaloux v. Killeen*, 886 F.2d 247, 249-51 (9th Cir. 1989); *but see Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1477-78 (9th Cir. 1993) (Fletcher, J., concurring) (disagreeing with *Chaloux* on this point).

Because the issue of the Hospital's potential liability on the facts of this case is not properly before the Court, *see* Petition for Writ of Certiorari at i, we do not address that issue here.

(in particular in light of the record before us) is inadequate to insulate officials from a § 1983 action." Pet. App. at 27. Under *Anderson v. Creighton, supra,* a public official is immune from damages liability in a § 1983 action if, in light of the information available to the official at the time of the challenged action, a reasonable official would consider that action to be lawful. *See* 483 U.S. at 640-41. Accordingly, "ignorance" of the facts *may* in some circumstances be a valid defense when it comes to the assessment of personal damages liability in a case of this nature.

What the court below was driving at, we submit, is that a public official cannot necessarily claim immunity for discharging an employee in violation of the First Amendment if his "ignorance" of the protected nature of the employee's speech is attributable to mere reliance on co-worker reports and a minimal investigation into those reports. Because the law is well-established that an employer may not terminate an employee for engaging in protected speech, a public official cannot be deemed to have acted *reasonably* in discharging an employee on the basis of her speech unless the official had a *reasonable* basis for concluding that the speech was unprotected. Although co-worker reports of the employee's speech and a minimal investigation into those reports may in some instances provide such a basis, that will not always be the case—particularly where, as here, the reports do not even purport to be a complete account of what was said, and the employee is known to have previously voiced disagreements with management on matters of public concern. *See* Pet. App. at 2-7. In such a case, further inquiry may be necessary before a public official may be said to have a reasonable basis for concluding that the employee's speech was unprotected. *Cf. Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1443-45 (9th Cir. 1991) (police officers are entitled to qualified immunity under *Anderson v. Creighton* when they act reasonably to investigate the facts bearing on the issue of probable cause before effecting a warrantless arrest)

The nature and scope of the further inquiry (if any) that an official must undertake in order to claim immunity in a case such as this will, of course, depend on the facts and circumstances confronting the official in each such case. *Cf. Anderson v. Creighton, supra,* 483 U.S. at 641 ("The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.").

CONCLUSION

For the foregoing reasons the decision of the court below should be affirmed.

Respectfully submitted,

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No. 92-1450

In The

Supreme Court of the United States

October Term, 1993

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,

Petitioners,

v.

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA) IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA) IN SUPPORT OF RESPONDENTS

I. INTEREST OF THE AMICUS CURIAE

The National Employment Lawyers Association is a national bar association of over 1,700 lawyers who regularly represent employees in employment-related disputes. Founded in 1985 and headquartered in San Francisco, NELA members comprise a large segment of the leaders of the bar specializing in employment law on behalf of employees. NELA members regularly handle cases involving government employment terminations

stemming from an employee's exercise of constitutional First Amendment privileges.

In light of its interest in the application of employment law, NELA has previously filed amicus briefs with this Court, as well as briefs before the Circuit Courts of Appeal and various State Supreme Courts.

Because of its practical experience with the issues at bar, NELA is well suited to brief this Court on the importance of the issues and the practical effects of the Court's decision beyond the immediate concerns of the parties.

The written consent of all parties have been filed with the Clerk of this Court.

II. SUMMARY OF THE ARGUMENT

This case presents the Court with the opportunity to clarify the standards to be applied when analyzing public employer retaliation against public employees who engage in First Amendment freedom of expression.

NELA recommends herein that the Court adopt the rationale applied by the Seventh Circuit in the instant case and reject the Petitioners' overly narrow interpretations of this Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138 (1983). NELA also respectfully proposes that the unequivocal language of the First Amendment must be interpreted so as to place the burden on the state to justify any encroachment of free expression it may wish to undertake rather than placing the burden on the speaker to justify the speech. This burden should require the employer wishing to restrain speech to first meet a rigorous "causation analysis test" requiring a close causal nexus be shown between the speech alleged to be harmful and the harm alleged to be suffered. Further, a government employer seeking to regulate speech should be required to demonstrate a "compelling state interest" in

limiting a public employee's expression and must be required to demonstrate that it utilized the "least-restrictive means" available to further its articulated interest. To this end, NELA urges this Court to adopt in public employment First Amendment cases a test akin to the "clear and present danger" causal nexus test enunciated by this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Finally, NELA respectfully urges the Court to renew its long-held belief, as enunciated in *Pickering*, that opposition of a public employee to policies, practices or procedures of a public institution or a public official must not, standing alone, justify the abridgement of such speech, for allowing a government to retaliate against an employee because of mere "dissent" is tantamount to allowing a government to "pick and choose" among the ideas it wishes to reward or punish. NELA urges that governmental employers must be "viewpoint neutral" with regard to the First Amendment for without a "viewpoint neutral" strict causation test the employer will tend to slip surreptitiously into penalizing opinions and into fostering regulation of speech purely based on the subjective belief of the reactive disturbances it causes or may cause.

III. ARGUMENT

A. The Firing of a Public Employee for Uttering Speech Subjectively Deemed by a Public Employer to be "Insubordinate" is an Unconstitutionally Vague and Overbroad Infringement of the Employee's First Amendment Rights

More than 26 years ago, this Court found unconstitutional a state statute permitting the employment termination of a public employee for uttering "any treasonable or seditious word or words" or for engaging in any

"seditious act or acts." In so holding, this Court found the terms "treasonable" and "seditious" to be "dangerously uncertain" and that "dangers fatal to First Amendment freedoms" inhere in the application of such vague terms to the realm of public employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 597-98 (1967). Further, this Court noted that the scope of these terms was so overbroad they could subjectively be interpreted by a governmental employer to have "virtually no limit." As such, a public employee could not "know where the line (was) drawn between 'seditious' and non-seditious utterances and acts." *Keyishian*, supra, 395 U.S. at 599.

In spite of this Court's holding in *Keyishian*, today another American stands before this Court with her public employment terminated because she asserted her constitutionally guaranteed right of free and open expression. The "sin" allegedly warranting the government's imposition of the "economic death penalty" upon Cheryl Churchill was that she spoke out on matters of the highest public concern, to wit: the health, safety, care, well-being and treatment of this nation's most valuable resource, its children. By criticizing the medical treatment infants in a state obstetrical facility were receiving, Cheryl Churchill sought to give voice to the voiceless within a government bureaucracy. For this, Cheryl Churchill was summarily fired even though the practices on which she had "blown the whistle" were practices that had put hospital patients at risk, violated state of Illinois nursing regulations, violated Hospital Accreditation Standards and violated professional nursing codes.[1]

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[1] See: *Churchill v. Waters*, 977 F.2d 1114, 1121-24 (7th Cir. 1992).

Cheryl Churchill, in the finest historical traditions of this country, is a heroine. The state, however, characterizes her "whistleblowing" as "unpleasant, uncooperative, negative and insubordinate" and uses those vague and overbroad standards to justify overriding her First Amendment rights.[2]

Allowing a government employer to unilaterally decide which speech of its employees it "believes *might* disrupt the office," "*might* undermine supervisory authority" and/or "*might* destroy close working relationships" is simply too vague, uncertain and subjective a standard on which to make contingent an American's constitutional right to freedom of expression. In fact, just as in *Keyishian*, such a "dangerously uncertain" standard has "virtually no limit" making it virtually impossible for a public employee to "know where the line is drawn" between what an employer may or may not deem to be appropriate, "insubordinate" and/or "disruptive" utterances. As such, the standard proposed by Petitioners would give unfettered authority to governmental supervisors to capriciously decide of which speech they would approve and not approve. NELA proposes, however, that a public employee's right of free expression cannot be made contingent on the capricious whims and sensitivities of a supervisor. In a free and open society a government must not unilaterally be able to restrain speech by simply referring to it as unpleasant, uncooperative, negative, disruptive, unprotected and/or not of a "public concern," for such a standard would place speech of public employees at the mercy of a capricious, authoritarian minority.

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[2] *Ibid.*, supra, at 1118-19.

B. The Public Has a Compelling Interest in Assuring a Public Employee's Right to Freedom of Expression Relating to Public Employment

1. Free Speech is an Indispensable Tool of Self-Governance in a Democratic Society

There is universal agreement that a major purpose of the First Amendment is to protect the free discussion of governmental affairs, including discussions of the structures, forms and manner in which government is operated or should be operated. *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).[3] For this and other reasons, this Court has previously ruled that government officials and institutions are afforded no greater immunity from criticism than other officials or institutions. *Bridges v. California*, 314 U.S. 252, 289 (1941).

NELA respectfully contends that interpretations by various district and appellate courts of *Connick* and *Pickering* severely infringe on a public employee's right to express opinions on such governmental matters, thereby establishing an inferior subclass of Americans who are prohibited by the capricious whims of their supervisors from speaking out on matters affecting the public weal. Simply put, NELA contends that even the "routine" operations of government institutions and the conduct of government officials are of such critical importance to the public well-being that they are matters of "public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978). Therefore, NELA urges this Court rule that limiting a public employee's right to free speech may not be conditioned on whether a supervisor subjectively finds such speech to be "disruptive" and/or "insubordinate."

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[3] See also: R. Smolla, *Free Speech in an Open Society* (New York: Vintage, 1993), Ch. 1-4.

2. Restriction of a Public Employee's Speech Undermines Self-Governance and the Free Marketplace of Ideas Essential to a Democratic Society

Restricting free expression of public employees invidiously alters the democratic process and dramatically undercuts the basis for deferring to government policy. Speech is a means of participation, a way to stand up and be counted, a way to be an active player in a democracy. All citizens in a democracy, including public employees who comprise approximately one out of seven workers in the American workforce, have a participatory interest in freedom of speech, an interest which grows not only from the needs of the state but from the entitlement of the citizen.[4]

In the "marketplace of ideas," speech serves the pursuit of political "truth."[5] It is the "marketplace" metaphor which reminds us to take the "long view" of government, a "long view" that leads us to the conclusion that "truth" has a stubborn persistence and "truth" will ultimately prevail *if* combined with pragmatic measures to give it a fighting chance.[6] Therefore, if in the long run the "best test of truth" is the power of "thought" to gain acceptance in the competition of the market, then in the long run the "best test" of intelligent political policy is its

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[4] See: M. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 601-604 (1982); and S. Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 U.C.L.A. L. Rev. 1103, 1197-98 (1983).

[5] See: A. Meiklejohn, *Free Speech and Its Relation to Self Government* (Port Washington, NY: Kennikat, 1972, 1948).

[6] Smolla, p. 7. See also: P. Garry, *The American Vision of a Free Press* (New York: Garland, 1990); and F. Schauer, *Free Speech*, (New York: Cambridge Univ. Press, 1982).

power to gain acceptance of the polity.[7] Free speech serves this end by facilitating majority rule. It insures that collective policymaking represents, to the greatest degree possible, the collective will.[8]

Free speech restrains tyranny, corruption and ineptitude.[9] For most of the world's history, "the state" has presumed to play the role of benevolent, but firm, censor of speech on the theory that wise governance proceeds from the wise governance of opinions.[10] The "social compact theory" underlying this government seeks to counteract this tendency by recognizing that ultimate sovereignty always rests with "the people" who never surrender their natural right to protest when the state exceeds the limits of legitimate authority.[11] It is through "speech" that "the people" ferret-out corruption and discourage tyrannical excess, always striving to keep government within the metes and bounds of the charter to which "the people" first brought it into existence. Without such right, stability in government is sacrificed.[12]

In spite of the fact that free speech is critical to self-governance, Petitioners advocate before this Court only the most narrow protection of speech. They have, in effect, succumbed to government's inevitable willingness

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[7] Holmes, "The Path of Law," *10 Harv. L. Rev.*, 447, 446 (1918); And see: *Abrams v. United States*, 250 U.S. 616, 630 (1919).

[8] Bickel, *The Morality of Consent* (New Haven, CT: Yale, 1975).

[9] See: Blasi, "The Checking Value in First Amendment Theory," A.B.F. Res. J., pp. 521, 527-42 (1977).

[10] T. Hobbs, *Leviathan* (New York: Liberal Arts Press, 1958), Part II, Ch. 18.

[11] J. Locke, *The Second Treatise of Government* (New York: Liberal Arts Press, 1952).

[12] T. Emerson, *The System of Free Expression* (New York: Random House, 1970), pp. 6-9.

to play "censor" by urging this Court to effectuate a "supervisory reasonableness test" as a means of regulating speech. In making their argument, however, Petitioners presume that speech regulation, particularly as it pertains to supposedly "routine" governmental administration, is somehow of less importance than other "grander" matters. This ignores the reality that to some extent self-government is related to virtually all affairs of modern life. NELA urges, therefore, that if laws are to be enacted regarding all aspects of our culture, then it is vital for freedom of speech to extend to all aspects of all laws so enacted.

3. Restriction of Speech Denies the Expressive Spirit of Humankind

There is a dangerous mind set that permeates efforts to treat political speech alone as meriting exalted First Amendment status. This mind set sends the message that only speech deemed useful to the enterprise of government will be granted special protection by the government and it will be for the government to define what is useful.

In the instant case, the state attempts to obtain the moral entitlement to presume to dictate what is worth saying and when everything worth saying has been said.[13] This, however, cannot and must not become the law. To the public employee seeking to exercise free expression, it is critical that he or she be heard, even if only to either "dissent" or to "second" another's views.[14]

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[13] See: Smolla, p. 16.

[14] Accord: *Time v. Hill*, 385 U.S. 374, 388 (1967); *United Mine Workers v. Illinois Bar Association*, 398 U.S. 217, 223 (1967); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); and *Abood v. Detroit Board of Education*, 431 U.S. 209, 323 (1977).

While self-governance and marketplace theories "justify" free speech as a means to an end, free speech is also an end in itself; intimately intertwined with human autonomy and dignity.[15] The guarantee of free speech among public employees is "justified" by the elegantly-simple rationale that what speakers think or say should be decided by the speakers and not by governments. Speech is more than "just" a negative restraint on government, it both protects and provokes the expressive spirit. Beneath the surface lies a vexing voice, one that affirmatively encourages Americans to speak, to take "stands," to demand to be heard, to *participate*. One of these "stands" is expressed in the concept that humankind's search for "truth" is best advanced by a free trade in ideas.[16] Yet, free speech is valuable for reasons that have nothing whatsoever to do with the "collective search for truth" or the processes of self-government; it is a right defiantly, robustly and irreverently to speak one's mind just because it *is* one's mind.[17]

In spite of the necessity for freedom of expression, in all quarters speech is under attack from the very governmental institutions and officials sworn to preserve and defend it. Perhaps these bureaucrats *qua* autocrats view themselves as "defenders" of the system. However, if so, they should be reminded of the words of Justice Brandeis:

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[15] Accord: *Procunier v. Martinez*, 416 U.S. 396, 427 (1974). And see: L. Tribe, *American Constitutional Law*, 1st ed., (Mineola, NY: Foundation, 1989), p. 579.

[16] Smolla, p. 11. And see: J. Nowak, R. Rotunda, N. Young, *Constitutional Law*, § 16.6, 3rd ed. (St. Paul, MN: West Publishing Co., 1986), § 16.6.

[17] R. Smolla, *Suing the Press* (New York: Oxford Press, 1986), p. 257; and M. Nimmer, *Nimmer on Freedom of Speech* (New York: Matthew Bender, 1984) § 1.01-§ 1.04.

> Those who won our independence believed . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. *Whitney v. California*, 274 U.S. 357, 375 (1927). (Brandeis, J., concurring.)

4. The Public Has an Overarching Interest in the Nature and Quality of Its Public Services

a. The Public Has an Economic Interest in Open Government

As this Court indicated in *Elrod v. Burns*, 427 U.S. 347, 355 (1976), both the government and the public have significant interests in ensuring public agencies are effectively and efficiently run. Unfortunately, this has led, at least in some quarters, to the unfounded conclusion that

"efficient" government occurs only in hierarchial, autocratic environments where "dissent" is squelched in favor of "silence" and where "harmony" and "blind obedience" take precedence over speech. Nothing could be further from the truth. Instead, study after study has indicated that an efficient workplace is full of workers who speak their minds, question the status quo and dissent from presumptions previously considered inviolable. In the modern efficient workforce, a supervisor's "power" or "authority" is diminished *for the sake of efficiency* while "doers," such as teachers, nurses and doctors, are given far greater leeway, authority and power *to effectuate* the goals of the organization. Therefore, if the balancing of interest test is to be applied in First Amendment cases, NELA urges the Court to reaffirm the value of open and frank speech and to consider the loss to society in emphasizing "harmony" over "dissent." The power of the state to abridge free speech simply must be seen as the exception rather than the rule. *Herndon v. Lowry*, 301 U.S. 242, 258 (1937). NELA also urges the Court to reaffirm its position that no one is more likely to enhance the efficiency and effectiveness of our public agencies than the teachers, doctors, nurses and other public employees who work in them and who freely and firmly stand up to point out the inefficiencies in those organizations. *Pickering*, supra, 391 U.S. at 571.

The question of which countries will thrive as we enter the 21st century is dependent on who will produce the best products; who has the best skilled workforce; who *will organize the best*; and whose *governmental and educational* institutions will be the most efficient. These, in turn, are largely dependent on the nature and quality of the services "the public" will receive from its governmental agencies. Therefore, if this society is to prosper, state and federal institutions must focus on how they

may most efficiently make life better for the citizens of this country.[18] As such, the public has an interest in the appropriate management of its public institutions; an interest that is infringed when narrow First Amendment interpretations are levied on public employees preventing them from "dissenting" from inefficient governmental administration.

NELA respectfully contends that certain of the progeny of *Connick* and *Pickering* run afoul of the public's interest in workplace efficiency by allowing governmental authorities to capriciously limit full, open and free expression of "dissent" in governmental workplaces. In fact, studies now indicate that modern workplaces, including governmental entities, must be adaptive to rapid change.[19] In order to be "efficient," therefore, government supervisors must understand that new workforce realities are beckoning to be addressed. They must understand that skill requirements of an increasingly knowledge-based, service-oriented economy are reaching a "critical stage" and there is a "critical need" for professionals to enter the governmental workforce in greater strength if this country is to thrive.[20] As such, government supervisors must be made to understand the needs of this rapidly-changing professional workforce and not be allowed to autocratically limit "dissent" of the very

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[18] L. Thurow, *Head to Head* (New York: Warner, 1993), pp. 23-63, 122-25. And see: J.K. Galbraith, *The New Industrial State*, 4th Ed., XXIX (New York: Penguin 1986).

[19] W. Johnston and A. Packer, *Workforce 2000* (Indianapolis: Hudson Institute, Inc., 1987); J. Boyett and H. Conn, *Workplace 2000* (New York: Penguin, 1991).

[20] J. Fernandez, *Managing a Diverse Workforce* (Lexington, MA: Lexington Books, 1991); and D. Jamieson and J. O'Mara, *Managing Workforce 2000* (San Francisco: Jossey-Bass, 1991).

employees most needed to meet these changing needs.[21] Likewise, courts must be reminded that allowing or encouraging the restraint of speech of public employees is not only unnecessary to public agency efficiency, but it is actually counterproductive to the legitimate needs of government, a fact recognized by this Court 44 years ago when it said:

> . . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is never the less protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest . . . There is no reason under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas . . . *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

As the "professionalization" of the governmental workplace increases, "doers" such as teachers, doctors and nurses must be allowed to take greater roles in controlling the workplace. Flexibility and creativity must be maximized and become more important than mere "endurance and loyalty."[22] "Dissent" must be seen as an

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[21] C. Stoner and L. Russell, "Creating a Culture of Diversity Management," working paper, Bradley Univ., Peoria, IL (1993).

[22] Boyett and Conn, Ch. 1.

effective and creative force in the workplace not to be stifled.[23] Information sharing, rather than authoritarian hierarchial decisionmaking, is the key to success.[24] "Conflict" must be seen to enhance organizational success by reducing tendencies toward complacency and "groupthink."[25] As such, governmental supervisors must adopt a "change agent" mentality.[26] They must understand that employees within their agencies need to be involved in "group decisionmaking" and that this will result in "intense interaction" between individuals.[27] They must also understand that in order to overcome bureaucratic

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[23] I.L. Janis, *Victims of Groupthink* (Boston: Houghton Mifflin, 1972), Ch. 9; I.L. Janis, "Problems of International Crisis Management in a Nuclear Age," *J. of Soc. Sci.*, Vol. 42, No. 2, 1986, pp. 201-220; I.L. Janis, "Groupthink," *Psychology Today*, November, 1971; J. Simmons and W. Mares, *Working Together* (New York: Knopf, 1983), p. 194; Bill Saporito, "The Revolt Against Working Smarter," *Fortune*, July 21, 1986, pp. 59-60; W. Bennis, *Changing Organizations* (New York: McGraw Hill, 1986), pp. 6-33, 64-80, 174-177; and W. Bennis, *American Bureaucracy* (U.S.: Aldine, 1970), pp. 165-187.

[24] Galbraith, Intro., 4th ed., Ch. VI-VIII and XIII; Boyett and Conn; K. Eisenhardt, "Agency Theory," *Academy of Management Review*, Vol. 14, No. 1, 1989, pp. 57-74.

[25] P. Nystrom and W. Starbuck, "To Avoid Organizational Crises, Unlearn," *Organizational Dynamics*, American Management Association, Spring 1984, pp. 53-65; K. Eisenhardt and L.J. Bourgeois, III, "Politics of Strategic Decision Making in High Velocity Environments," *Academy of Management Journal*, Vol. 31, No. 4., 1988, 737-770; K. Eisenhardt and C. Schoonhoven, "Organizational Growth," *Administrative Science Quarterly*, 35, 1990, pp. 504-529; Simmons and Mares; Bennis: *Changing Organizations* and *American Bureaucracy*. And see, I.L. Janis: *Victims of Groupthink*; and "Groupthink".

[26] Bennis: *Changing Organizations*; and *American Bureaucracy*.

[27] Galbraith, pp. 141-142.

inertia, they will *need* individuals to act as "disruption centers" constantly questioning the status quo.[28]

Success will flow to those who effectively open their workforce to a wide range of ideas, dissent, conflict and "disruption." Stifling creativity, information, dissent and/or feedback will merely lead to inefficient, counter-productive and corrupt government.[29]

Today, instead of maximizing "power" in the hands of a government supervisor to squelch dissent, in efficient workplaces "authority" must be redirected to the lowest level possible. For professionals, this occurs at the "doer" level.[30] "Doers," such as teachers, doctors and nurses, are simply in a better position to exercise judgment about operating problems than upper-level managers who know of a problem, if at all, only through delayed and much condensed reports. Governmental entities, however, have "bucked the trend" by routinely pushing discretionary authority "upwards" in the organization.[31] However, in order to be efficient, "prerogatives of status" must vanish, not so much to be replaced with workplace equality as to be replaced with recognition based on performance. Therefore, when considering the appropriate factors to be "balanced" in public employment First Amendment cases, NELA respectfully urges this Court to adopt the "long view" of government by emphasizing

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[28] Supra, notes 23-25.

[29] See: Nystrom and Starbuck; Eisenhardt and Bourgeois; (stifling dissent merely forces it "underground" where it negatively impacts on organizational performance); Boyett and Conn, (participatory management is an efficient way to cut overheads and raise productivity and reduces the "boss's power"); and Janis.

[30] Supra, notes 19-25.

[31] See generally: J. Wilson, *Bureaucracy* (U.S.: Basic Books, 1989), p. 133.

government efficiency through the maximization of employee freedom of expression over autocratic authoritarian rule.

Today, the simple truth is that because they are overly authoritarian and hierarchial, governmental entities are much less likely than private agencies to operate efficiently.[32] This, in turn, has lead to a huge loss of savings to the American public.[33] In fact, according to the 1984 Grace Commission report, over $400 billion in annual savings could be realized if federal government agencies were managed properly.[34] Were no such "costs" involved, one *might* argue that government "efficiency" would be irrelevant to a public employee First Amendment case. However, such costs make public entity management and the speech of public employees, such as Cheryl Churchill, a matter of "public concern." This is true even when the speech of the employee "merely" relates to internal agency efficiencies.

Others have also made the point that our public agencies are inefficient because they are too authoritarian. A panel of the National Academy of Public Administration (NAPA), consisting of sixteen senior government executives holding the rank of Assistant Secretary, issued a report coming to the same conclusion:

> Over many years, government has become entwined in elaborate management control systems

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[32] Wilson, pp. 349-351; Galbraith, Ch. VI and XI-XIII.

[33] J. Bendor, "Formal Models of Bureaucracy," *Brit. J. of Pol. Sci.* (1988), pp. 553-95; and Eisenhardt.

[34] *President's Private Sector on Cost Control* (New York: McMillan, 1984), known as the Grace Commission after its Chairman, J. Peter Grace. See also: General Accounting Office and Congressional Budget Office, *Analysis of the Grace Commission's Major Proposals for Cost Control* (Washington, D.C.: Government Printing Office, 1984).

and the accretion of progressively more detailed administrative procedures. This development has not produced superior management . . . Procedures overwhelm substance . . . critical elements of leadership in management appear to wither in the face of a preoccupation with process . . . Management systems are not management . . . The attitude of those who design and administer the rules . . . must be reoriented from a "control mentality" to one of how can I help get the mission of this agency accomplished.[35]

b. The Public Has a Social Interest in Speech Related to Efficient Government Operations

In addition to "efficiency," the government has other valued outputs as well. These include its reputation for integrity and its reputation for instilling confidence, but not false confidence, in the people it seeks to govern.[36] Such outputs are not enhanced, however, by stifling whistleblowers, gagging dissenters and punishing government employees whose only "sin" is that they sought to maximize organizational effectiveness, protect public safety and insure the public weal. Supervisors cannot expect that "blind obedience" is the equivalence of "harmony" or that a "harmonious" workplace is an "efficient" workplace. Efficiency, like democracy, is a boisterous and messy proposition; there is simply nothing wrong with a public employee suggesting that the "emperor has no clothes." Likewise, there is nothing wrong with a public employee yelling "fire" in a crowded theater if the

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[35] NAPA, *Revitalizing Federal Management* (Washington, D.C.: National Academy of Public Administration, November, 1983).

[36] Wilson, p. 317.

employee reasonably believes the theater to be on fire.[37] Restricting freedom of expression of our public employees dramatically limits said employees' ability to "blow the whistle" on expensive, inefficient, unsafe and/or unresponsive government. This, in turn, dramatically impacts on the public's ability to "believe in" its institutions. Therefore, such limitations on public employees' ability to speak freely must not be allowed to prevail. As such, NELA respectfully urges this Court to reaffirm that speech must be maximized rather than limited by vague, overbroad and anti-democratic speech restrictions.

C. Interpretations of the Balancing of Interest Test Enunciated in *Connick v. Meyers* Appear to Invite, if Not Justify, Attempts to Encroach on the Guarantees of Free Speech

1. Emphasis on the Subjective Beliefs of Supervisors Devalues Speech

A society that wishes to remain open and free must not merely "allow" its citizens a wide range of expressive freedom, but most go further to encourage the opening of the deliberative processes of government to the light of public scrutiny. "Censorship" is a social instinct and open government does not come easily. As such, a society that values "openness" must devise rules that are deliberately tilted in favor of speech in order to counteract the inherent proclivity of governments to engage in control.[38]

NELA maintains that the initial inquiry in this case, or any other public employment First Amendment case, must not be *whether* a public employee's speech is

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[37] *Pickering*, supra, 391 U.S. at 574.

[38] Smolla, *Free Speech in an Open Society*, pp. 3-42; and F. Haiman, *Speech and Law in a Free Society*, (Chicago: Univ. of Chicago Press, 1981) pp. 297-339, 369-409.

"appropriate" but, rather, *who* will decide what speech is appropriate. NELA also maintains in an open society that decision must rest with the speaker and not with governmental officials, high or petty.[39]

A review of *Connick's* and *Pickering's* progeny demonstrates, on the whole, that the application of the balancing approach enunciated in those cases has tended, in general, to have resulted in relatively low protection of speech.[40] One reason for this is that when the balancing test has been employed by many of this nation's courts, speech has tended to have been devalued as "just another social interest" to be thrown in the mix. This may be seen in the instant case where the district court succumbed the "dark underside" of balancing. Conversely, insightful decisions such as that rendered by the appellate court herein strike the right chord by emphasizing that freedom of speech must be treated as a "preferred societal value" and must be maximized.

There are a number of negative impulses endemic to speech "balancing tests" that warrant ongoing suspicion of the integrity and wisdom of allowing such balancing to continue unfettered. Governmental entities have an inexorable inclination to undervalue free speech interests and to overvalue other interests that come into conflict with speech. Censorship, not openness, is the reflexive first instinct of government.[41] Rules and regulations restricting free speech are particularly prone to be infected by

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[39] Accord: *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). And see: Smolla, *Free Speech in an Open Society*, pp. 3-5, 12.

[40] See, e.g.,: *Versage v. Township of Clinton, New Jersey*, 984 F.2d 1359 (3rd Cir. 1993); *Marquez v. Turnock*, 967 F.2d. 1175 (7th Cir. 1992); and *Propst v. Weir*, 937 F.2d 338 (7th Cir. 1991).

[41] See generally: Smolla, *Free Speech in an Open Society*, Ch. 1-4; Galbraith, Ch. VI, XIII and XXXIV; and Wilson.

prejudice or paranoia and driven by short-term rather than long-term thinking.[42] Furthermore, the "perceived evils" that motivate governmental entity implementation of anti-speech rules tend to appear more viscerally and immediately commanding than the long-term, theoretical abstractions supporting free speech.[43]

In this environment, the marketplace of ideas, the self-fulfillment of the speaker and the role of speech in self-governance are often seen as "just theories" to be snickered at, like so many empty banalities, as bureaucratic decisionmakers calculate the costs and supposed benefits of their short-term interests. Applications of this Court's balancing tests tend to overlook the frailties of free speech by ignoring the anatomy of censorship. The human instinct to censor thrives, creating an irrepressible conflict with the human instinct to speak. Outrage, self-righteousness and paranoia feed the maw of censorship. Squelching speech drives it underground, where it festers into more dangerous hysterias. In words of Justice Brandeis, "Men feared witches and burnt women." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J. concurring.)

2. Emphasis on "Disruption" in the Public Workplace Devalues Speech

Allowing government unilaterally and subjectively to decide which speech it "believes *might* disrupt the office," "*might* undermine supervisory authority" and/or "*might* destroy close working relationships" ignores the realities of the modern efficient workplace by emphasizing costly

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[42] Supra, notes 23-25; J. Nowak, et al., *Constitution Law*, 1st ed. (St. Paul, MN: West 1978), Ch. 18; and Bendor.

[43] *Ibid*. And see *Abrams*, supra.

and unduly authoritarian leadership over creative feedback. The *Connick* rule has given the green light to those authoritarian voices who wish to maximize "bureaucratic process" over output, fear over efficiency and subordination over engaged cooperation. Further, the *Connick* balancing test has often been applied so as to encourage employers to mistake passivity for cooperation, blind obedience for efficiency and open discussion for "disruption." The pendulum has simply swung too far in favor of autocratic supervisors and needs to swing back toward the middle in favor of speech.

As in many similar organizations, among governments an attitude often exists which values means over ends, leaving supervisors often worrying more about "blind obedience" than about achieving the ultimate goal of the organization.[44] Because of this, they are often more preoccupied with finding ways of "controlling" exactly what their employees do rather than effectuating desired organizational outcomes. This, in turn, has lead to inefficient and costly government, a trend which must not be encouraged in free speech cases.[45]

Decentralized, less autocratic management "works" in the modern workplace in part because "professional" members are influenced by external reference groups of fellow professionals who prescribe "professionalism" standards. Physicians and nurses, for example, are responsive to such "professional" standards. Such persons are expected by their professions to put the well-being of their clients and the search for truth above their own narrow interests. Society invests heavily in their training, in part because clients of professionals, such as

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[44] Wilson, pp. 22-33; and R. Merton, "Bureaucratic Structure and Personality," *Social Forces*, (1940); pp. 560-68.

[45] See: K. Eisenhardt; and Wilson, pp. 164, 357.

medical patients, are unable to adequately evaluate the quality of the procedures to which they are subjected.[46] The need, therefore, for highly bureaucratized management stifling creativity, feedback, "dissent" and/or "conflict" is minimal and should not be reinforced in First Amendment cases by giving managers unfettered authority to limit speech.

Teachers, doctors, nurses and other public employees bring to their agencies not only their skills, but also their professional standards. Therefore, government agencies simply cannot hire them and utilize them as if they are unthinking tools. Black & Decker may make tools, but Harvard and Notre Dame do not.[47] Instead, worker peer groups set expectations to which "doers" must conform, especially when such professionals work in a threatening, unpredictable or confrontational environment such as a hospital. Further, "disruption" is kept in check by strong social and psychological pressures which keep employees from acting contrary to the goals of their organizations and their leaders. The simple fact of human nature is that workers have a much stronger inclination to "obey" supervisors than to disobey.[48] In fact, pressures to conform to the status quo are so great that instead of worrying about "disruption," many supervisors must instead seek to enhance and encourage "disruption" and dissention.[49]

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[46] Wilson, p. 149.

[47] Wilson, p. 371.

[48] S. Milgram, *Obedience to Authority* (New York: Harper & Row, 1974), Ch. 1 and 9; S. Milgram, "Behavioral Study of Obedience," *J. of Abnormal and Social Psychology* Vol. 67, No. 4, 1963, pp. 371-78; and supra, notes 24 and 26.

[49] Supra, notes 24-26, 34 and 45.

NELA respectfully urges this Court to render a decision in this case which considers the true economic and social costs to this country in preventing people who are most engaged in government from speaking out on matters of "public concern," including the economics, safety, health, efficiency, policy and administration of the agencies in which they work. These employees must be allowed to speak out even if it means said employees might be seen as "dissenting" from management decisions or seen as challenging their supervisor's decisions or engaging in what some supervisors might call uncooperative, negative and/or "disruptive" behavior.

In spite of this need for "engagement" in the workplace, applications of the *Connick* disruption analysis indicate a perception exists in some courts that government employees are "nay sayers" and that government agencies have had to "put up" with overly negative employees who, if left to their own devices, would destroy the ability of our public agencies to function. Such perceptions, however, are simply unfounded. Instead, contrary to prevailing folklore, governmental employees are not invariably a collection of "nay sayers"; they are all too often "yea sayers."[50] This can have tragic consequences if such attitudes serve to squelch dissent, leaving government unchecked and unchallenged.

One example of such unfounded and unchecked optimism may be seen in the January, 1987 Space Shuttle Challenger disaster. According to the Rogers Commission Report, the National Aeronautics and Space Administration (NASA) was imbued with an overly optimistic attitude that reflected a belief it could "do anything." The Rogers Commission later wrote, however, that NASA's "can do" attitude ultimately and dramatically interfered

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[50] Supra, notes 23-25 and 48.

with "the mission" by stifling the reservations, dissent and constructive criticisms of the project engineers.[51] In fact, one NASA engineer testified that he did not express safety concerns because he had previously been "personally chastised" and "crucified" by his supervisors for raising design objections.[52] This testimony confirmed the Rogers Commission's findings that supervisors had "dominated" their subordinates and that this "domineering" management style went a long way towards explaining the shuttle disaster. What the Challenger disaster vividly indicates, then, and what contemporary organizational studies urge, is that government organizations must not stifle the voices of dissent within their ranks. Blind, obedient subservience and "group harmony" may be a prescription for disaster.

If we are to prosper as a free and open society, government employees must be allowed to step forward and express their concerns, even if those concerns affect their own employment situations. There simply is no way to separate "public" concern from "private" concerns. NELA submits, however, that appellate and district courts have interpreted *Connick* in such a way as to establish an *ad hoc* First Amendment rule leaving it to chance whether a public employee may engage in dissent at the workplace.

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[51] Presidential Commission on the Space Shuttle Challenger Accident, Report to the President (Washington, D.C.: U.S. Government Printing Office, 1986), known as the Rogers Commission Report after its chairperson, William P. Rogers, pp. 171-72, 199-201.

[52] Quoted in McConnell, *Challenger: A Major Malfunction* (Garden City, New York: Doubleday, 1987) p. 1987. See also: J. Trento, *Prescription for Disaster* (New York: Crown, 1987), Ch. 10-11.

Currently one might ask what advice an attorney could give to a hypothetical engineer who wanted to "blow the whistle" on unsafe practices at some governmental entity such as NASA. NELA contends that under many current legal interpretations of *Connick* and *Pickering*, the attorney would probably have to tell the employee that such speech might not be considered to be of a public concern; particularly if the employee had previously been disciplined a time or two for failing to keep quiet about actual or perceived safety deficiencies. Further, the attorney would have to advise that even if the matter were of a "public concern," under the progeny of *Connick* if the employee persisted in "dissenting," the employee's supervisor could well describe him or her as "disruptive." In fact, it would appear that the more the employer overreacted to the "dissent," the more the employer could later claim the employee was "disruptive."

The attorney would also have to advise of the doctrine of qualified immunity; that is, that the employee could possibly be prohibited from bringing an action against the supervisor who violated his or her rights because no previous case had ever been reported which was sufficiently factually close to that faced by the employee. Therefore, the supervisor might later successfully claim that he or she had not acted in reckless disregard of existing case law. As such, qualified immunity has the effect of "freezing" First Amendment law at some pre-*Connick*, pre-*Pickering* time period. The bottom line, therefore, would be that the attorney would have to advise the NASA engineer of the combined effects of qualified immunity, *Pickering*, et al., and *Connick*, et al., and advise the client of the consequences that such narrow interpretations could impose on the ability of the

public employee to speak out. NELA respectfully contends that such a "bottom line" is simply unconscionable and the "dangerous uncertainty" raised by overly narrow judicial interpretations of *Connick* and *Pickering* must cease.

In this day and age, employment discussions which supposedly apply to "just one person" clearly implicate and touch on the public good. To limit such speech, therefore, not only runs contrary to the direction of contemporary organizational management, but it also binds, gags and tramples the First Amendment. This Court, therefore, must give firm direction that the "pendulum" has swung too far in favor of government and must now swing more in favor of speech. Government supervisors who are often the subject of a public employee's free expression of dissent simply must not be allowed, *sua sponte*, to define the parameters of the First Amendment. To do so would be to ignore the realities of human nature.[53] It would allow supervisors to use vague and overbroad terms such as "insubordination" as *in terrorem* mechanisms impermissibly limiting and squelching free expression. In a free, open and democratic society this is intolerable, particularly when it is essential to the public good that such authoritarianism practices cease.

IV. CONCLUSION

The Petitioners herein offer beguilingly sympathetic arguments in their Orwellian quest to have this Court overturn the well-reasoned decision of the Seventh Circuit. In so arguing, however, Petitioners have stood rationality on its ear. They would have this Court pronounce that free expression of the public well-being is dissent;

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[53] Nystrom and Starbuck; Janis, *Victims of Groupthink*; Janis, "Groupthink"; Milgram.

that dissent is disruption; that disruption is anarchy; and that professionalism is insubordination. They would have this Court pronounce that there is an "important governmental interest" in squelching nearly any expression of dissent by a public employee within the public employment sector if a supervisor *might* be offended by it. They would also have this Court believe that public officials have a monopoly on vision, wisdom and authority relative to the public weal. They would have this Court command that when public officials speak, they speak *ex cathedra*, and that henceforth their pronouncements are not subject to evaluation, reevaluation, discussion or dissent. They would, in effect, have this Court mandate that public nurses such as Respondent must violate the most sacred tenets of their profession to "do no harm" if they wish to be free of the wrath of governmental supervisors. Such arguments cannot, and must not, constitute the law of this land.

NELA contends that if the balancing of interests approach is to continue to be utilized in public employee discipline cases, the unequivocal language of the First Amendment must be interpreted so as to place the burden on governments to justify any encroachment of free expression they may wish to impose rather than placing the burden on the speaker to justify the speech.[54] This burden must require a government wishing to restrain speech to first meet a rigorous "causation analysis test" requiring that a close causal nexus be shown between the speech alleged to be harmful and the harm alleged to be suffered. Further still, a governmental employer seeking

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[54] Accord: *Elrod*, supra; *Perry v. Sindermann*, 408 U.S. 593 (1972); and *Rutan v. Republican Party*, 497 U.S. 62 (1990). See also: S. Shiffrin, *The First Amendment, Democracy and Romance* (Cambridge: Harvard Univ. Press, 1990).

to regulate speech must be required to demonstrate a "compelling reason" to limit a public employee's free expression and must be required to demonstrate that it utilized the "least-restrictive means" available to further its articulated interest.[55] To this end, NELA urges this Court to adopt in First Amendment public employment cases a test akin to the "clear and present danger" causal nexus test enunciated by this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

"Opposition" of a public employee to the policies, practices or procedures of a public institution or a public official must not, standing alone, justify the abridgement of such speech, for allowing a government to terminate an employee because of mere "opposition" is tantamount to allowing a government to "pick and choose" among the ideas it wishes to reward or punish. Governmental employers must, therefore, be "viewpoint neutral" with regard to the First Amendment so as to protect conscientious public servants such as Cheryl Churchill. Without a "viewpoint neutral," strict causation test, governments will tend to slip surreptitiously into penalizing opinions

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[55] Accord: *Sable Communications of California, Inc. v. FCC*, 109 S.Ct. 2829, 2836 (1989); and *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

and into fostering regulation of speech purely because of the reactive disturbances it causes or may cause.[56]

Respectfully submitted,

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[56] Accord: *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 806 (1985); and *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46, 49, n. 9 (1983). See also Post, *Between Governance and Management*, 34 U.C.L.A. L. Rev. 1713, 1824 (1987). And see: Smolla, *Free Speech in an Open Society*, Ch. 3; K. Greenwalt, *Speech, Crime and the Uses of Language*, (New York: Oxford Univ. Press, 1986), pp. 80-126; J. Mill, *On Liberty*, 1859); Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519 (1979).

(12)

No. 92-1450

IN THE

Supreme Court of the United States

CYNTHIA WATERS, Et Al.,

Petitioners,

V.

CHERYL R. CHURCHILL, Et Al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AND THE NEW YORK CITY HOUSING PATROLMAN'S BENEVOLENT ASSOCIATION, INC., AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether summary judgment may be granted to a public employer who fires an employee based on unsubstantiated reports and rumors that the employee engaged in speech, where the speech by the employee addressed the employee's concerns over problems and risks in a substandard nurse staffing policy at a public hospital?

   A) Whether speech addressing public health risks associated with a substandard nurse staffing policy at a public hospital relates to a matter of public concern?

   B) Whether the Seventh Circuit below erred as a matter of law when it balanced the competing interests of Nurse Churchill and her employer and found that "Churchill's interest in fulfilling her duties and obligations as an ethical, responsible professional ... clearly outweighs the hospital's interests in interfering and ultimately preventing her from speaking out on important matters of public concern?"

2. Whether it was sufficiently established in 1987 that a public employer could not fire an employee for communicating about a substandard nurse staffing policy or whether an individual public employer may be qualifiedly immune from damages in such a case?

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IN THE

Supreme Court of the United States

October Term 1992

No. 92-1450

CYNTHIA WATERS, Et. Al., Petitioners

v.

CHERYL R. CHURCHILL, Et. Al., Respondents

On Writ of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AND THE NEW YORK CITY HOUSING PATROLMAN'S BENEVOLENT ASSOCIATION, INC. AS *AMICI CURIAE*

INTEREST OF THE *AMICI CURIAE*

The Southern States Police Benevolent Association (hereafter SSPBA) is a non-profit association comprised of over twenty thousand law enforcement officers and related public employees in ten southern states. The New York City Housing Patrolman's Benevolent Association, Inc. (hereafter NYHPBA) was formed in 1954 and has over three thousand active and retired members.

Both *Amici* and their members are vitally interested in the grave constitutional issues before this Court. Law enforcement officers and nurses, like Cheryl Churchill, frequently suffer reprisal for whistleblowing and communicating about issues within their agencies. Both *Amici*,

their members and millions of public employees in over 182,000 governmental units[1] would be severely jeopardized and their speech chilled if the Seventh Circuit judgment and opinion below were to be reversed.[2]

Amici vehemently submit that the continued right to free speech by public employees, as historically recognized by this Court, is perhaps the most important component of maintaining safety and efficiency in the public sector workplaces of America. *Amici* accordingly submits this brief to assist this Court in its resolution of this important case.[3]

STATEMENT OF THE CASE

Amici adopt the Statement of the Case and Facts as presented by Respondent. The presentation of facts in Respondents' brief represents a stark alternative to the one-sided factual allegations in Petitioners' brief. These distinctions are perhaps dispositive of this case.

Amici will highlight a few facts relevant to their arguments, *infra*. After Churchill and Dr. Koch voiced serious concerns about the cross-training policy, both came under intense scrutiny.[4] The employer began purportedly documenting allegations against them in "files."[5] Beginning on August 21, 1986, the retaliation intensified into a full blown campaign to punish both Churchill and Koch, which was prompted by their voicing concerns over the cross-training program.

On January 16, 1987, Churchill engaged in a speech with a cross trainee, Melanie Perkins-Graham. Churchill spoke with Ms. Graham as they had their dinners around 5:00 p.m. Nurse Mary Lou Ballew only overhead limited "bits and pieces" of the conversation between Churchill and Graham, and Ballew was not paying much attention. Ballew began overhearing the conversation in the middle of it, and it did not make any sense to her. This conversation, and the circumstances thereof, are specified in detail in Respondents' brief. This conversation started the runaway truck that caused the termination of Churchill.

Upon hearing that Churchill had spoken, Waters advised her superior that it was time to fire Churchill. See R.76A, T. 5, p. 310. When Waters and her superior, Ms. Davis, followed up on Churchill's speech with the recipient of the speech, Waters and Davis told the recipient of the speech, Ms. Graham, that they wanted confirmation of whether Churchill had criticized the hospital. See R.76A, T. 5, pp. 311-314; R.76E, T. 43.

Waters stated that she would not have fired Churchill had it not been for the speech which was reported to her. See R.76B, T. 8, p. 436.; R. 76A, T. 4, pp. 301. Waters also admitted that Churchill's speech as reported could have referred to criticism of the cross-training policy. See R76B, T. 8, pp. 444, 447 - 448. In light of all of the facts and circumstances, it is logical and reasonable to conclude that Waters knew enough of the subject matter of Churchill's speech.

Jean Welty, the shift supervisor who heard Churchill's speech, testified that Churchill's speech disrupted nothing. See R.76E, T. 24, pp. 52 -53. Waters and Davis were not concerned because they did not ask Graham whether her enthusiasm had been dampened by the

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[1] See McGuinness, Constitutional Employment Litigation, 43 Am. Jur. TRIALS 1 (1991)("The laws governing public employment relations profoundly affect the daily lives of millions of public employees as well as the efficiency and quality of government services.") Approximately fourteen million persons are employed by state and local government throughout the country. U.S. Department of Commerce, Statistical Abstract of the United States 1989, No. 479 at 293. Excluding the military, more than three million persons are employed by the federal government. *Id.* No. 512 at 318.

[2] *Amici's* members are frequently confronted with reprisal by police management for commenting upon law enforcement policies. The sheer volume of reported cases addressing free speech issues by public employees demonstrates the substantial magnitude of retaliation from speech.
In many American jurisdictions, public sector collective bargaining is not authorized and the employment at-will doctrine is still well entrenched. Due process rights frequently depend upon property interests, and public employers have responded to that by explicitly negating such interests. Thus, for many public employees, the First Amendment is among a very few limited sources of protection from governmental retaliation.

[3] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of Court.

[4] Petitioner Waters admitted that Churchill had never been obstructionist in her opposition to the cross-training program.

[5] According to Jean Welty, a former supervisor in obstetrics, "sometimes [Waters] did[write down different things]" from what she would say in the evaluation sessions. See R.76E, T.24, P. 199. Thus, Waters' production of "notes", and the accuracy thereof, to purportedly document allegations is inherently suspect.

conversation with Churchill and Graham did not say that it had been. See R.76A, T. 5, pp. 296, 304. Most nurses in the OB department never heard of Churchill's conversation and none heard of any adverse affect that Churchill's speech may have had. Agency disruption was therefore not involved.

SUMMARY OF ARGUMENT

The speech and expressive conduct of Respondent Cheryl Churchill must be protected by the First Amendment to the United States Constitution because her speech touched upon a matter of critical local and national concern: a nurse staffing policy in violation of health standards to purportedly address a nursing shortage in a public hospital where the public health is in issue.

In his authoritative treatise, Senator Sam J. Ervin, Jr. explained how our "First Amendment freedoms are often grossly abused." Ervin, Preserving The Constitution (1984). Senator Ervin observed that "free speech is in mortal danger in America." *Id.* at x. Cheryl Churchill's firing for speaking about health issues demonstrates the wisdom in Senator Ervin's analysis.

As an "insider" public employee and knowledgeable nurse at the McDonough District Hospital, Churchill appropriately communicated her ideas about the nurse staffing policy known as cross-training. The staffing policies of public hospitals are, for obvious reasons, matters of vital public concern because public health and welfare are directly in issue. Such speech has been historically protected.

The radical position being advocated by Petitioners herein would have dedicated public employees turn a deaf ear to hazards within their agencies in order to save their jobs. Petitioners have seized upon an employment term of art, "insubordination[6]," to purportedly justify firing a dedicated public servant. "Insubordination" has perhaps become the most common subterfuge when attempting to cover up protected con-

[6] After concluding that "insubordination" would justify the termination, the employer's agent performing the so called "investigation" against Churchill, testified that she did not even talk to Churchill before coming to the "insubordination" conclusion. See Petitioner's Brief at 12. Such biased investigations without affording the accused a chance to have any input at all is suggestive of partiality, prejudgment and palpable arbitrariness.

duct or discrimination.[7] The alleged "insubordination' defense is frequently used as the last defense of the defenseless in employment litigation.

In this case, turning a deaf ear on the nurse staffing problem could lead to death of patients, a prospect that no reasonable public employer should desire to risk.[8] Remaining silent in this context would have offended ethical and professional obligations of nurses everywhere. Consequently, the First Amendment not only protected Churchill's right to communicate, but sound public policy also encouraged her communication.[9] To allow public employers with malicious retaliatory motives to fire nurses who communicate will chill the free speech rights of nurses and public employees throughout the nation. Cheryl Churchill is to be commended - rather then fired - for communicating so as to protect the health of her patients.

As the Seventh Circuit found, fact questions predominate this case. A jury must decide what Churchill said before the ultimate application of law can be made. *Jones v. Dodson*, 727 F.2d 1324 (4th Cir. 1984).[10] At this juncture, Churchill's version of facts must be accepted. As the Seventh Circuit found, in "taking action to report this controversial practice, Churchill lived up to the highest ethics of her most noble profession." 977 F.2d at 1125. Churchill's speech was well within the parameters of free speech by public employees as enunciated by this Court in *Rankin v. McPherson*, 483 U.S. 378, 387 (1987): [D]ebate on public issues should be uninhibited, robust, and wide open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp

[7] Amici regularly have to deal with bogus charges of "insubordination" in defending their members. See, e.g., *Howell v. Town of Carolina Beach* 417 S.E.2d 277 (N.C. 1991), where the public employee was fired for "insubordinate speech" in a memorandum addressing defective police firearms. The court rejected the attempted misuse of the insubordination defense. The speech was held protected.

[8] Petitioners concede in their brief that "[t]he department had had staffing problems." Petitioner's Brief at 9. This concession legitimizes Churchill's speech and underscores the public concern issue.

[9] See e.g., *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3rd Cir. 1983)(public policy wrongful discharge claim grounded in constitutional free expression right).

[10] This is precisely what the Seventh Circuit below observed. Since the characterization of the speech is substantially in dispute, the trier of fact must make the credibility judgments. 977 F.2d at 1124.

attacks on government and public officials."

I. INTRODUCTION

As this Court explained in *Rankin v. McPherson*, 483 U.S. 378, 384 (1987):

> Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse.

Such discourse about dangerous nurse staffing policies is inherently healthy. The nature of Churchill's speech is accurately set out in the Seventh Circuit opinion below. Petitioner Waters was displeased with Churchill's "opposition to the hospital's improper implementation of a nurse cross-training program, which Churchill was convinced was detrimental to the welfare of patients in the obstetrical ward..." 977 F.2d at 116. The dangers apparent to Churchill and others from the new nurse staffing plan are accurately set out by the Seventh Circuit. See 977 F.2d at 1116 - 1120. The Seventh Circuit demonstrated how the risks of which Churchill complained contravene fundamental standards of healthcare organizations. 977 F.2d at 1122 - 23.

A. The Record Must be Construed In Churchill's Favor On Summary Judgment

Despite pervasive attempts by Petitioners to submit their one-sided view of the facts as a basis for this Court's analysis, it is imperative that this Court follow its settled practice of construing the facts in the light most favorable to the party opposing summary judgment, the Respondent herein. A careful reading of the record and opinion below demonstrates that Petitioners efforts to characterize the speech in question rises to the level of mischaracterization.[11]

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[11] Examples of misleading characterizations of facts, construed heavily in Petitioner's favor appear throughout their brief. The Seventh Circuit opinion presents a more objective factual presentation, consistent with this Court's teachings about basic summary judgment principles. The Seventh Circuit in fact found that Petitioners had "misrepresent[ed] the record" below. 977 F.2d at 1127 n. 10.

Nowhere is Petitioners' selective portrayal of alleged facts any more misleading than their allegations of Churchill's work record and history. To the contrary, Churchill's work history was officially documented and the objective evaluations demonstrated a conscientious and dutiful employee. Churchill's year end evaluation of January 5, 1987 indicated "standard performance" on all categories including "positive attitude" and "accepting what could not be changed" and "constructively working to change what could and should be changed." Petitioner's loaded allegations, overwhelmingly construed in Petitioner's favor, totally fails to acknowledge the obvious pattern of retaliation against Churchill and Dr. Koch. Despite Petitioners' quarrel with Churchill, they did nothing to punish her until she engaged in her speech of January 16, 1987. It was Churchill's speech that caused the ultimate act of brutal retaliation.

Amici implore this Court to carefully review the extensive presentation of facts in Churchill's brief. Churchill therein demonstrates, with exacting precision, the facts developed which are simply not the alleged facts being suggested by Petitioners. Accepting at face value the purported facts as suggested by Petitioners would violate this court's summary judgment standards. The contemporary summary judgment standard in employment termination cases is extreme: summary judgment should not be granted unless it is perfectly clear that there is no genuine issue of material fact. E.g., *McKinney v. Bd. of Trustees*, 955 F.2d 924, 928 (4th Cir. 1992).

II. STANDARD OF REVIEW

Since the issue before the Court involves First Amendment free speech rights, this Court has enunciated the most rigorous methodological framework for determining the issue. "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976)(public employee discharge examined under First Amendment). Such a First Amendment "encroachment 'cannot be justified upon a mere showing of a legitimate state interest.'...The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." Id.; *Rutan v. Republican Party*, 497 U.S. ____, 111 L Ed.2d 52, 68 (1990)(government must have a "vital interest" in limiting First Amendment freedoms of public employees.); *Eu v. San Francisco*, 109 S.Ct. 1013, 1021 (1989)(compelling governmental interest needed to

burden free speech or association).[12]

For generations, this Court has vigilantly protected the free speech and associational rights of public employees like Churchill. E.g., *Rankin v. McPherson*, 483 U.S. 378 (1987)(affording free speech protection to employee who remarked about assassination attempt on President Reagan; Court found speech was of public concern and therefore protected); *Pickering v. Board of Education*, 391 U.S. 563 (1968) and their many antecedents. There is no reason to reverse or retreat from this proud heritage.

III. THE VALUE OF THE FIRST AMENDMENT FREE SPEECH INTEREST IN THE PUBLIC EMPLOYMENT CONTEXT

Why is it so essential that public employees be allowed to freely speak without suffering reprisal by the government? *Moore v. City of Kilgore*, 877 F.2d 364 (5th Cir. 1989)(public employee speaking about manpower shortage protected) provides a thorough and compelling explanation of the "Values Which the First Amendment Embodies" in the specific context of public employment:

> Traditional, 'Free speech is protected because it has values; it springs from the age of enlightenment out of which the spirit of the American Revolution came...' Citizens in a democracy need to hear about problems that their government encounters. To assist people in making informed decisions, information must be made public for citizen deliberation. 877 F.2d at 379.[13]

[12] Courts have been especially clear that summary judgment should not be granted in employment cases absent the most extreme circumstances. The circuit courts have "emphasized repeatedly the drastic nature of the summary judgment remedy and has held that it should not be granted unless it is **perfectly clear** there are no genuine issues of material fact in the case." *Ballinger v. N.C. Agric. Ext. Serv.*, 815 F.2d 1001, 1004-05 (4th Cir. 1987); *McKinney v. Bd. of Trustees*, 955 F.2d 924, 928 (4th Cir. 1992)(applying perfectly clear standard in constitutional employment discharge case). Cases involving questions of motive are especially inappropriate for summary judgment. E.g., *Stumph v. Thomas Skinner*, 770 F.2d 93 (7th Cir. 1985)

[13] In the public hospital context, issues of policy must be constantly debated, internally and externally, so that health care institutions can remain abreast with the latest procedures to enhance efficiency and ultimately better health for all. In the public hospital context, chilled silence can be deadly.

"Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). At the core of the First Amendment is the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. U.S.*, 354 U.S. 476, 484 (1957). A paramount priority of the First Amendment is to protect expression relating to "the manner in which government is operated or should be operated." *Mills v. Alabama*, 384 U.S. 214 (1966). Speech about the policies and practices of a public hospital whose decisions affect the daily lives of citizens in communities throughout America is logically consistent with this Court's historic precedents guaranteeing speech rights.

Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. *NAACP v. Claiborne*, 458 U.S. 886, 913 (1982). Chief Judge Sam Ervin's opinion in the leading First Amendment public employee case of *Piver v. Pender Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987) could not be clearer:

> The value of freedom of speech, the Constitution's 'most majestic guarantee' is so high that it cannot be adequately described in purely instrumental terms. 835 F.2d at 81.

What would happen in our more than 182,000 governmental agencies if public employees were chilled into silence as Petitioner's position contemplates? What would happen if public employees turned a deaf ear rather than communicating about job-related problems? Public agencies must become aware of inept policies and practices; the senior policymakers with public agencies and the public become aware of such polices and practices by insider employees, like Cheryl Churchill, who communicate, sometimes complain and blow the whistle on such inept practices. Communicating and reporting governmental inefficiency is a time honored American tradition. Petitioners admit that "Churchill's experience was consistent with that of other nurses, most or all of whom voiced concerns about the cross-training program..." Petitioner's Brief at 7 - 8.[14]

[14] Petitioner's efforts to dramatize their self-serving characterization of Churchill's speech as "insubordinate speech" are endless as this mischaracterization appears throughout their brief and in their statement of issues. However, in reality, Churchill's speech was not insubordinate to anyone. Even if it was insubordinate speech, whatever that means, the speech must still be protected.

IV. CHURCHILL'S SPEECH ADDRESSED A MATTER OF VITAL PUBLIC CONCERN AND IS THEREFORE PROTECTED

A threshold question in most public employee discharge cases premised upon the exercise of one's right to free speech is whether the speech related to a matter of public concern. E.g., *Rankin v. McPherson*, 483 U.S. 378, 384-85 (1987); *Piver v. Pender Bd. of Educ.*, 835 F.2d 1076, 1078 (4th Cir. 1987). Petitioners essentially concede that nurse staffing issues are of public concern. See Petition for Writ of Certiorari at 11 -12 at note 11.[15]

Speech relating to public concern has been defined as any speech that can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Meyers*, 461 U.S. 138, 146 (1983). "Issues which touch upon public concern are limitless." *Moore v. City of Kilgore*, 877 F.2d 364, 370 (5th Cir. 1989). Nurse staffing policies at public hospitals are unquestionably within the concern of the community.

Petitioner's contention that Churchill's speech did not address issues of public concern does not cite a single circuit or other case supporting its contention. See Petitioner's Brief at 33 - 36. That is because no case has ever held that the public health is not a matter of public concern for purposes of a free speech claim by a public employee.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." *Rankin*, 483 U.S. at 384-85. Chief Judge Sam Ervin's authoritative opinion in *Piver* explains the public concern framework:

> The "public concern" or "community interest" inquiry is better designed - and more concerned - to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that it is. The principle that emerges is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee - most typically, a private personnel grievance. The focus is therefore upon whether the "public" or community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a "private" matter between employer and employee.

Here, the speech in issue is not some private matter. Public hospital policy and patient care are among the most common and important public concerns. Circuit courts have consistently held that working conditions of public employees constitutes a matter of public concern. Thus, even if this Court deems that Churchill's speech related to her own working conditions, her speech would still be protected.[16]

A. Employment Policies At Public Workplaces Inherently Involve Public Concern

A plethora of other cases consistently hold that speech or criticism by public employees about departmental employment practices is of utmost public concern and constitutionally protected. E.g., *Powell v. Basham*, 921 F.2d 165 (8th Cir. 1990)(publicly employee criticized his own employer's promotion practices; such speech held constitutionally protected); *Thompson v. City of Starkville*, 901 F.2d 456 (5th Cir. 1990)(public employee's speech about his own department's personnel

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[15] However, the public concern issue must be analyzed to determine the extent or degree of public concern because that is especially relevant under this Court's framework in *Connick v. Meyers*, 461 U.S. 138 (1983).

[16] See *Hickory Firefighters v. City of Hickory*, 656 F.2d 917, 1920 (4th Cir. 1981). Even if the Court deems that Churchill had some personal interest, as a result of her employment with the Hospital, that does not affect the protected nature of the speech. Where there exists an overlap, a person can have a personal interest in an issue, yet it remains nonetheless a matter of public concern. See *Rode v. Dellarciprete*, 845 F.2d 1195, 1201-1202 (3rd Cir. 1988); *Kinsely v. Salado Ind. School Dist.*, 916 F.2d 273, 278-79 (5th Cir. 1989); *Zamboni v. Stagler*, 847 F.2d 73, 77 (3rd Cir. 1988); *Matulin v. Lodi*, 862 F.2d 609,612-13 (6th Cir. 1988); *Thompson v. City of Starkville*, 901 F.2d 456, 465 (5th Cir. 1990); *Hall v. Ford*, 856 F.2d 856 F.2d 255, 260 (D.C. Cir. 1988); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983).

practices held protected); *Gillette v. Delmore*, 886 F.2d 1194 (9th Cir. 1989)(firefighter's speech concerning manner in which police and firefighters performed their duties was of public concern and protected); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980)(firefighter's remarks critical of fire chief and fire department held protected); and other cases *infra*. Public employees must not be muzzled for political or personal purposes at the expense of the core values of the First Amendment.[17]

B. The Content of Churchill's Speech Compels Protection

Of the three factors to analyze (content, form and context of speech), the Circuit courts have held that the "**content, subject matter**, of the speech in issue is always the central aspect" in making the public concern determination. *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75 (4th Cir. 1988). A plethora of courts have held that speech relating to the conduct and performance of public agencies is of utmost public concern and is among the most protected forms of any kind of speech. [18] Conditions within public hospitals are of such great public

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[17] Churchill's remarks did not arise out of a personal or personnel dispute, or grievance with her employer. Rather, her remarks represented a broad concern over the medical and ethical propriety of the nurse staffing policy.

[18] E.g., *Biggs v. Village of Dupo*, 892 F.2d 1298, 1301-02 (7th Cir. 1990)(public employee's interview with press discussing lack of agency funding protected); *Manhatten Beach Police Ass'n v. City of Manhatten Beach*, 881 F.2d 816 (9th Cir. 1989)(public employee's letter to local newspaper critical of manpower shortage held protected); *Rode v. Dellarciprete*, 845 F.2d 1195 (3rd Cir. 1988)(public employee's interview with reporter alleging racial harassment of her held protected); *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988)(public employee's statements to press regarding employment discrimination held protected); *O'Donnell v. Yanchulis*, 875 F.2d 1059 (3rd Cir. 1989)(police chief's statements to press held protected); *Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir. 1988)(letter alleging public agency's improprieties held protected); *Murphy v. City of Flushing*, 802 F.2d 191, 196 (6th Cir. 1986)(public obviously concerned with how a police department is operated); *Bricknell v. Norton*, 732 F.2d 664 (8th Cir. 1984)(Public has a "vital interest" in police department); *Soleman v. Royal Oak Township*, 842 F.2d 862 (6th Cir. 1988)(public employee's statements alleging departmental improprieties held of public concern and protected); *O'Brien v. Town of Caldonia*, 748 F.2d 403, 407 (7th Cir. 1984)(public employee's communications alleging departmental problems "is deserving of vigilant protection by the First Amendment.")

concern because those conditions constantly affect the level of public health and safety.

Speech relating to conditions within public agencies has consistently been held to be constitutionally protected. E.g., *Scott v. Flowers*, 910 F.2d 201, 211 (5th Cir. 1991). If such conditions and problems are not discussed by public employees and others, such problems are not likely to be resolved for the benefit of the public. In *Rankin*, this Court held that an expressed desire to kill President Reagan was of public concern and constitutionally protected. If such offensive speech with overtones of criminal behavior is protected, it hardly can be gainsaid that Churchill's non-offensive speech relating to vital public health issues is likewise entitled to protection.

Speech by public employees about **morale problems** within their own employing agencies is also consistently held to be constitutionally protected. E.g., *Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir. 1988); *Brukiewa v. Police Commissioner*, 263 A.2d 210 (Md. 1970)(in a seminal case, police officer's public criticism on public television that morale had "hit its lowest ebb" held protected); see numerous cases cited *supra*.

Even direct and harsh criticism of public agency management by employees has been historically protected. E.g., *Clemons v. Dougherty County*, 684 F.2d 1365 (5th Cir. 1982); *Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986)(public employee's criticism of mayor while at workplace held protected); *Clary v. Irvin*, 501 F. Supp. 706 (E.D. Tex. 1980)(police officer's complaints about police chief's performance, equipment shortages and personnel policies held to be protected speech). In *Clary*, the court explained that "as providers of public services, the officers had the prerogative, even the duty, to comment on the quality of that service when trying to improve it." Cheryl Churchill was acting within the spirit of this tradition when trying to improve nursing and medical conditions within her employing agency. Even if Churchill's speech criticized Waters, it must be protected. Employment within the public sector, especially in public hospitals, requires supervisors such as Waters to handle such foreseeable rigors as criticism by staff as part of her duties and function.

Clemons is especially persuasive. There, the plaintiff, a police sergeant, strongly criticized his own chief of police. The court characterized the plaintiff's speech as "highly critical" and then held that the remarks about the chief and the department must be protected. Even

a public employee who described his boss as a "son of a bitch, a bastard, as sorry as they come and nothing but a back stabbing son of a bitch" was engaging in protected speech. *Waters v. Chafin*, 684 F.2d 833 (11th Cir. 1982). Complimentary speech that does not invoke robust debate typically does not need constitutional protection.

Situations like *Clemons*, this case, and others cited herein involve the type speech that sometimes invokes often brutal retaliation including outright terminations by public employers. It is this type case that makes one appreciate the First Amendment's majestic protections. Without such constitutional protection, public employers could chill any meaningful criticism or debate about conditions in such agencies thus depriving taxpayers from knowing the efficiency of government.

C. The Context of Churchill's Speech Favors Protection

At the outset, it is imperative to recognize that the **context** of Churchill's speech came at an appropriate time and place. Nor did it come on the heels of a personnel grievance. Churchill's concerns were work-related concerns, which she communicated after the nurse staffing policy began to cause problems.

The fact that Churchill did not communicate publicly does not detract from the protected nature of her speech. This Court has expressly held such private speech to be protected. *Givehan v. Western Line*, 439 U.S. 410, 414-16 (1970); accord *Rankin v. McPherson*, 483 U.S. 378, 387 n.11 (1987). Many of our most troubling matters of public concern, such as race discrimination in *Givehan*, frequently initially arise in essentially private discussions.

In virtually all of the leading First Amendment public employee discharge cases, the employee has somehow spoken about his or her employing agency or issues related thereto. See, e.g., *Connick* (employee complained about office transfer policy in her employing agency); *Piver* (Plaintiff school teacher's speech in support of tenure for his principal); *Ware v. Unified School Dist.*, 881 F.2d 906 (10th Cir. 1989)(employee speaking out about school bond issue was of public concern); *Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir. 1989)(letter relating to police departmental improprieties in plaintiff's own department was of public concern and protected).

The context of Churchill's speech was strikingly similar to the many

cases affording protection. Employee lunch breaks are perhaps the most common time that employees have an opportunity to discuss workplace issues with co-workers.

D. Form of Speech: Verbal Speech In A Classic Employment Forum

Certain features of Churchill's speech enhance its importance to her and to the public. First, the speech in issue took place on the job where employees frequently discuss and debate agency related issues such as the nursing staff policy.[19] Churchill had actual knowledge of the issues being discussed. As *Piver* explained: "the public has a need to hear from those who know concerning the performance of public officials." 835 F.2d at 81; accord *Moore*, 877 F.2d at 372. Churchill's speech was professional, internal, factually accurate and low key; it was not threatening, vulgar, defamatory, rude or otherwise offensive.

E. The Public's Right To Know Must Be Protected

Churchill's right to speak about these issues does not simply help focus the inquiry, it also protects the public and its right to know. *Virginia State Bd. v. Virginia Citizens*, 425 U.S. 748, 756-57 (1976)(public's right to receive information); *Kleindienst v. Mandel*, 408 U.S. 753, 758, 762-65 (1972)(public's right to hear alien's speech).[20] In *Moore*, the court held that "both Moore and the public have a strong interest in Moore's speech" about public personnel manpower shortages. 877 F.2d at 372. The foregoing analysis makes it clear that this case involves considerations which transcend an employer-employee dispute. It is difficult to conceive a matter of greater public concern than public health.

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[19] Churchill did not publicly blast the Hospital or the policy, which could have raised issues of disruption not present in this Case.

[20] *Accord Red Lion v. FCC*, 395 U.S. 367, 386 (1969)(public's right to access); *Thomas v. Collins*, 323 U.S. 516 (1945)(right of workers to hear organizer's speech); *Martin v. Struthers*, 319 U.S. 141, 143 (1943)(public's right to receive information).

V. THE BALANCING TEST: THE INTERESTS OF THE COMMUNITY AND CHURCHILL SUBSTANTIALLY OUTWEIGH ANY POSSIBLE INTEREST OF THE DEFENDANTS

In most cases, courts balance the interests of the government as employer with the interests of the speaking employee. In such cases where the employee directly speaks about his or her employer and causes substantial harm or actual disruption to the employer, then the court must weigh and balance the interests of the parties. If Churchill had publicly criticized her employer, then the court would have to employ the balancing test.[21] Petitioner presents the bald assertion that "since nurses work closely together ... a lack of cooperation or disharmony could have an adverse affect on the efficient delivery of appropriate health care." Petitioner's Brief at 32 (emphasis added). Petitioners' theory of potential disruption is speculative and not grounded on any facts in the record which would reasonably support this strained theory. Debating controversial policies does not cause disharmony; rather, it serves to resolve disharmony by getting the problems out in the open.

The record before this Court does not present facts indicating actual disruption to the employer. Nor was there any objectively identifiable serious potential for substantial future disruption to develop from Churchill's speech. The Seventh Circuit correctly found that the District Court's decision finding that Churchill's speech was "inherently disruptive" was "erroneous because it is based on inferences from the record that are adverse to Churchill." 977 F.2d at 1123.

While this Court's opinion in *Connick* recognized in dicta that an employer need not always have to wait until substantial actual disruption materializes before taking action against an employee, the circuit cases following and interpreting *Connick* have held that future potential

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[21] However, even if Churchill had directly and publicly criticized her employer, given the extreme public importance of the underlying issue - the effectiveness of a nursing staffing policy which affects the public health and safety - the interests should be balanced in the favor of Churchill and the public.
Numerous cases have recognized that public employees are free to communicate about and even directly and publicly criticize their own employers. E.g., *Brawner*, 855 F.2d 192 (police officer criticized his own agency; speech found protected); *Manhatten Beach*, 881 F.2d 816 (police officer's letter to press complaining of manpower shortage held protected); see numerous cases cited *supra*.

disruption must be objectively ascertainable before it may be used as a factor in the balancing equation. E.g., *Jackson v. Bair*, 851 F.2d 714, 717 (4th Cir. 1988). Logic and common sense suggests that any speech - good, bad or indifferent - may always have the potential for some future disruption.

Even when a court objectively determines that there is a serious likelihood of future substantial disruption, the court must also then weigh and balance that against the problems or even disruption that may develop if the employee speech is chilled. To silence a nurse trying to communicate about a staffing policy that is dangerous would risk the health of patients and would have the likely potential to adversely affect employee morale. To frustrate and punish employees for communicating about job related issues will likely jeopardize morale and therefore cause agency inefficiency and disruption. Thus, it seems more logical that the dangers of suppressing speech are far greater than allowing the free flow of ideas.

Speech by public employees, especially that of whistleblowers and others who criticize the government, by its very nature, has the potential to stir things up at the government agency being criticized. Such effects of speech is certainly no reason to balance the interests in the government's favor because First Amendment protection is not limited to non-controversial speech. See *Czurlansis v. Alabnese*, 721 F.2d 98, 107 (3rd Cir. 1983)("it would be absurd to hold that the First Amendment generally authorizes government officers to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office..."); *O'Donnel v. Yanchulis*, 875 F.2d 1059, 1062 (3rd Cir. 1989)(even a finding of actual disruption is not sufficient to conclude that speech is not protected). The First Amendment is designed to prevent governmental employers from requiring public employees "to conform their beliefs and associations to some state-selected orthodoxy." *Rutan*, 111 L.Ed2d at 67.

"Debate on public issues should be uninhibited, robust, and wide open, and ... may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Rankin*, quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). "Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected." *Id.*

Circuit Courts have held that potential or threatened disruption is

not enough to limit the First Amendment rights of public employees. *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985)(police officer's entertainment offensive to some held to be constitutionally protected). Other cases have consistently held that in public agencies, "the complained of disruption must be real [and] not imagined." *Thomas v. Carpenter*, 881 F.2d 828, 831 (9th Cir. 1989), quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983). Even where a public employer testifies that the speech "caused a lot of disruption in the department," such speech is constitutionally protected. See *Biggs v. Dupo*, 892 F.2d 1298, 1303 (7th Cir. 1990). As *Biggs* demonstrates, conclusory or speculative assertions of disruption are inadequate. Accord *Zamboni v. Stamler*, 847 F.2d 73, 78 (3rd Cir. 1988)(potential disruption of public employer inadequate basis to punish detective).

A. Connick is Distinguishable On Several Grounds

Connick involved an assistant district attorney, Shelia Myers, who engaged in serious misbehavior causing actual disruption within the District Attorney's office. In *Connick*, Myers was confronted with a job transfer and this action was personal and unique to her, as contrasted with broader personnel issues that may have affected the entire agency.[22] After Myers was informed of the transfer, which she strongly opposed, she responded by preparing an employee survey which was distributed while on the job. Distribution of this survey while on the job caused a "mini-insurrection" within the office. *Id.* at 141.

Connick and the case *sub judice* are distinguishable on a number of factual and legal grounds. Myers' alleged protected conduct came on the heels of her own personnel dispute, while Churchill had no pending personnel or personal dispute with anyone. Myers' statements questioned the integrity of her own supervisors in a highly sensitive context in a district attorneys' office, while Churchill's speech focused upon dangerous policy. Myers' conduct was designed to "gather ammunition for another round of controversy with her superiors... [and reflected her] dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre." *Id.* at 148. Churchill's speech bears no relation to the obvious personal and personnel dispute as in *Connick*. The critical

[22] Here, Churchill's speech not only related to a matter affecting the entire agency, but also the delivery of health services to an entire community.

difference is that *Connick* involved matters of only limited public concern, while public health is an issue of overwhelming public concern. This distinction is dispositive.

B. Actual vs. Potential Disruption

In *Connick*, the Court, in dicta, observed that the employer may not have to allow full disruption to materialize before taking action **where the matter in question does not involve clear public concern.** Since Myers' conduct in *Connick* only involved public concern in the slightest and most tangential respect, her conduct was clearly outweighed by the employee's on-the-job "mini-insurrection." The question of reasonable apprehension of disruption did not have to be analyzed in *Connick* because what happened was an actual "mini-insurrection." Churchill's conduct cannot be remotely likened to that of Myers.

C. The Sliding Scale of Protection Depends Upon the Degree of Public Concern

The "reasonable belief" test applies only when the speech "touch[es] upon matters of public concern in only a most limited sense..." *Connick*, 461 U.S. at 154. *Connick* emphasized that "a stronger showing [of disruption] may be necessary if the employee's speech more substantially involved public concern." 461 U.S. at 152. This "stronger showing" of disruption is applicable here because Churchill's conduct involved the type of substantial public concern that *Connick* envisioned. This fact is born out in circuit cases construing *Connick*, as actual disruption is required in cases where the public concern is particularly strong.

"The nature of the government's burden to show disruption, moreover, varies with the content of the speech." *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992)(employee's memo criticizing her own employing agency's director and problems within the agency held to constitute a matter of public concern and protected). "The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Id.* The disruption to be proven by the employer must be "actual, material and substantial ..." Id at 1140, citing numerous cases. Disruption must be "real [and] not imagined."

The latest public employee free speech cases demonstrate that even reports by public employees about their own personnel related problems

are typically of public concern because of the broad public impact of adverse conditions in public agencies. E.g., *Wilson v. UT Health Center*, 973 F.2d 1263, 1269 (5th Cir. 1992)(complaints about sex harassment within police agency are of public concern); *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992). "Where First Amendment rights are concerned, operational efficiency must be real and important before they can serve as a basis for discipline or discharge of a public employee." *Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985); *Schalk v. Gilmore*, 906 F.2d at 496.

In view of the overwhelming public concern for nurse staffing policies, substantial disruption would have to be shown to outweigh the right to free speech. See *Frazier v. King*, 873 F.2d 820, 826 (5th Cir. 1989); *Matherne v. Wilson*, 851 F.2d 752, 761 (5th Cir. 1988).

Connick's "reasonable belief of disruption" language in dicta must be carefully analyzed in light of traditional First Amendment values. While this slippery standard would only be applicable where there is not a substantial public concern, this standard is very difficult to apply. This standard affords abusive public employers with unwarranted discretion to subvert important speech rights.[23]

THE NON-ISSUE OF THE DUTY TO INVESTIGATE

Petitioners purport to claim that the Seventh Circuit's analysis regarding the employer's knowledge of the nature of the speech is somehow erroneous. Petitioners also obfuscate the real issues here by complaining that a public employer has no duty to investigate the nature of an employee's conduct before proceeding to terminate the employee even where the conduct in question has been historically protected. Contrary to Petitioners' assertions, this Court is not presented with the question of whether a public employer has some separate and independent duty to investigate the conduct of its employees before termination. Petitioners have a duty to not act with deliberate indifference to the free speech rights of their employes.

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[23] The actual disruption standard is far more appropriate because evidence of actual disruption is objectively ascertainable. Potential disruption involves speculation. The potential disruption determination presents difficult problems that is unworkable in application.

Petitioner's theory evades the essential question of who has the burden of proof in justifying the discharge. In *Rankin* and *Connick*, this Court squarely held that "[t]he state bears a burden of justifying the discharge on legitimate grounds". *Rankin*, 483 U.S. at ; *Connick*, 461 U.S. at 150. *Accord Elrod v. Burns*, 427 U.S. 347, 362 (1976)("the burden is on the government..."). The governmental employer must establish that the speech was not protected by showing that there was a compelling governmental interest to justify the discharge of Churchill.

The Seventh Circuit decision below is consistent with the teachings of this Court.[24] The Seventh Circuit found that it was unnecessary to recognize a First Amendment right to due process. 977 F.2d at 1126. As the Seventh Circuit explained, this Court has enunciated what has become known as the *Mt. Healthy* framework, which has guided the lower courts on the question of causation. *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977). As the Seventh Circuit pointed out, a jury must sort out and determine the "point" of Churchill's speech. Thus, in this line of cases, a decision on whether the speech is protected will not come until long after the termination.

However, as the Seventh Circuit explained, where a public employer discharges an employee for speech without knowing the essential parameters of the speech, it acts at its own peril.[25] This type of arbitrary

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[24] In fact, several cases demonstrate that procedural safeguards are sometimes necessary in the First Amendment context. E.g., *Speiser v. Randall*, 357 U.S. 513, 521 (1957)("before a [public employer] undertakes to restrain unprotected speech, it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights..."); *Chicago Teachers v. Hudson*, 475 U.S. 292, 303 n. 12 (1986); Monaghan, First Amendment Due Process, 83 Harv. L. Rev. 518, 1520-24 (1970).

[25] The position suggested by the United States is startling. "An employer does not violate the First Amendment when it fires an employee in the mistaken belief that the employee has engaged in insubordinate speech involving purely personal matters." Brief of the United States as Amicus Curiae at 11. First, it was not reasonable for the employer to believe that the speech involved purely personal matters. Rather, it was logical for the employer to believe that the speech related to the questionable cross training program. Second, the notion of allowing a mistaken belief to satisfy an employer's burden of proof under *Rankin* and *Connick* is incredible. However, the United States at least concedes that "[w]e do not argue that the employer must be shown to have known, as a practical matter, that the speech is afforded First Amendment protection." Brief of United States at 15 n.3.

government action is often illustrative of an ulterior motive.[26] Proceeding to terminate Churchill as they did, Petitioners acted with sufficient deliberate indifference to Churchill's rights so as to invoke section 1983 liability. Without doubt, the **conduct** that Churchill engaged in which involved speech was a substantial or motivating factor in the termination. The notion that the employer did not take the minimum time to reasonably ascertain what actually had transpired can not be turned into a defense as Petitioners have attempted to do. If that were the case, every public employer would just act with "willful blindness" in a deceptive way so as to attempt to escape responsibility.

Here, there was such evidence of a retaliatory scheme against Churchill that one can readily infer that the public employer had reason to know the nature of Churchill's speech, the nurse staffing policy. The deliberate indifference test was established, which satisfies the *Mt. Healthy* standard.

VI PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY UNDER 42 U.S.C. 1983 BECAUSE THE LAW WAS CLEARLY ESTABLISHED IN 1987 THAT A PUBLIC EMPLOYEE COULD NOT BE DISCHARGED FOR ENGAGING IN SPEECH ABOUT INFERIOR NURSING PRACTICES IN PUBLIC HOSPITALS

Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) qualified immunity generally protects "government officials performing discretionary functions" from personal liability when their conduct does not violate "clearly established statutory or constitutional rights..."

Should a public employer have known, as of 1987, that the termination of a public employee for speaking about nursing staffing problems in a public hospital violate the right to free speech? The free speech rights of public employees in this context have been specifically settled at least since 1968 since *Pickering*. The Circuit cases, *infra.*, further

[26] See *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Courts have defined arbitrary and capricious as "willful an unreasonable action without consideration or in disregard of facts or without determining principle." Black's Law Dictionary 96 (5th ed. 1979); *U.S. v. Carmack*, 329 U.S. 230, 243 n.14 (1946). A plethora of employment cases demonstrate that the failure of a public employer to make reasonable inquiry into the employment dispute is evidence of arbitrariness, prejudgment and even bad faith. See McGuinness, The Reemergence of Substantive Due Process As A Constitutional Tort : Theory, Proof & Damages, 24 New Eng. L. Rev. 1129 (1990).

demonstrate the principle that free speech claims by public employees are not generally dismissed via qualified immunity because of the long history of recognized free speech protection.

The American ideal of free speech by public employees is as well recognized as any constitutional right. The Eleventh Circuit recently explained in *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992), that the demotion of a deputy sheriff for speech would violate the First Amendment was clearly established law in 1988. "A reasonable public official in Sheriff Gallagher's place could not have believed, in light of the holdings and rationales of *Pickering* and *Connick* and *Rankin*, that demoting Stough did not violate the First Amendment." 967 F.2d at 1529.[27] A plethora of similar cases specifically involving free speech rights of public employees have rejected qualified immunity and these cases outline the status of the law at given times. E.g., *Buzek v. Saunders*, 972 F.2d 992 (8th Cir. 1992); *Powell v. Basham*, 921 F.2d 165, 168 (8th Cir. 1990); *Click*, 970 F.2d 106 (5th Cir. 1992); *Brawner v. City of Richardson*, 855 F.2d 187, 193 (5th Cir. 1988)(termination of public employee for speech about departmental problems held clearly established; qualified immunity not available).

Similarly, *Vasbinder v. Ambach*, 926 F.2d 1333 (2nd Cir. 1991) held that the law prohibiting retaliation against public employees has been clearly established since *Pickering*. Accord *Frazier v. King*, 873 F.2d 820 (5th Cir. 1989)(no qualified immunity for discharge of public employee for free speech); *Lewis v. Harrison*, 805 F.2d 310 (8th Cir. 1986)(same). Numerous other circuit courts have held that First Amendment rights of public employees are well established.[28] In any event, summary judgment is not favored on qualified immunity where there is an issue of motive. *Conner v. Reinhard*, 847 F.2d 384, 398-99 (7th Cir. 1988); *Prokey v. Watkins*, 942 F.2d 67, 74 n. 7 (1st Cir. 1991).

The Seventh Circuit below correctly held that summary judgment must therefore be denied to Petitioners because they violated clearly established law and because fact questions remain regarding motive that make summary judgment inappropriate.

[27] "Precise factual correlation between then existing law and the case at-hand is not required." *Snell v. Tunnel*, 920 F.2d 673, 699 (10th Cir. 1990).

[28] *Piesco v. City of New York*, 933 F.2d 1149 (2nd Cir. 1991)(denying qualified immunity in public employee retaliation case); *Miller v. Town of Hull*, 878 F.2d 523 (1st Cir. 1989); *Dube v. State*, 900 F.2d 587 (2nd Cir. 1990); *Roth v. Veterans' Adm.*, 856 F.2d 1401 (9th Cir. 1988).

CONCLUSION

Churchill's speech helped focus professional and public concern on vital issues of public health and safety. To allow Churchill's discharge would chill every public employee into a dangerous code of silence. The government has not proved that it had some paramount, vital and compelling interest as required by this Court's cases in order to limit Churchill's speech. The fact questions predominate making summary judgment inappropriate. The judgment of the Seventh Circuit must be affirmed.

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